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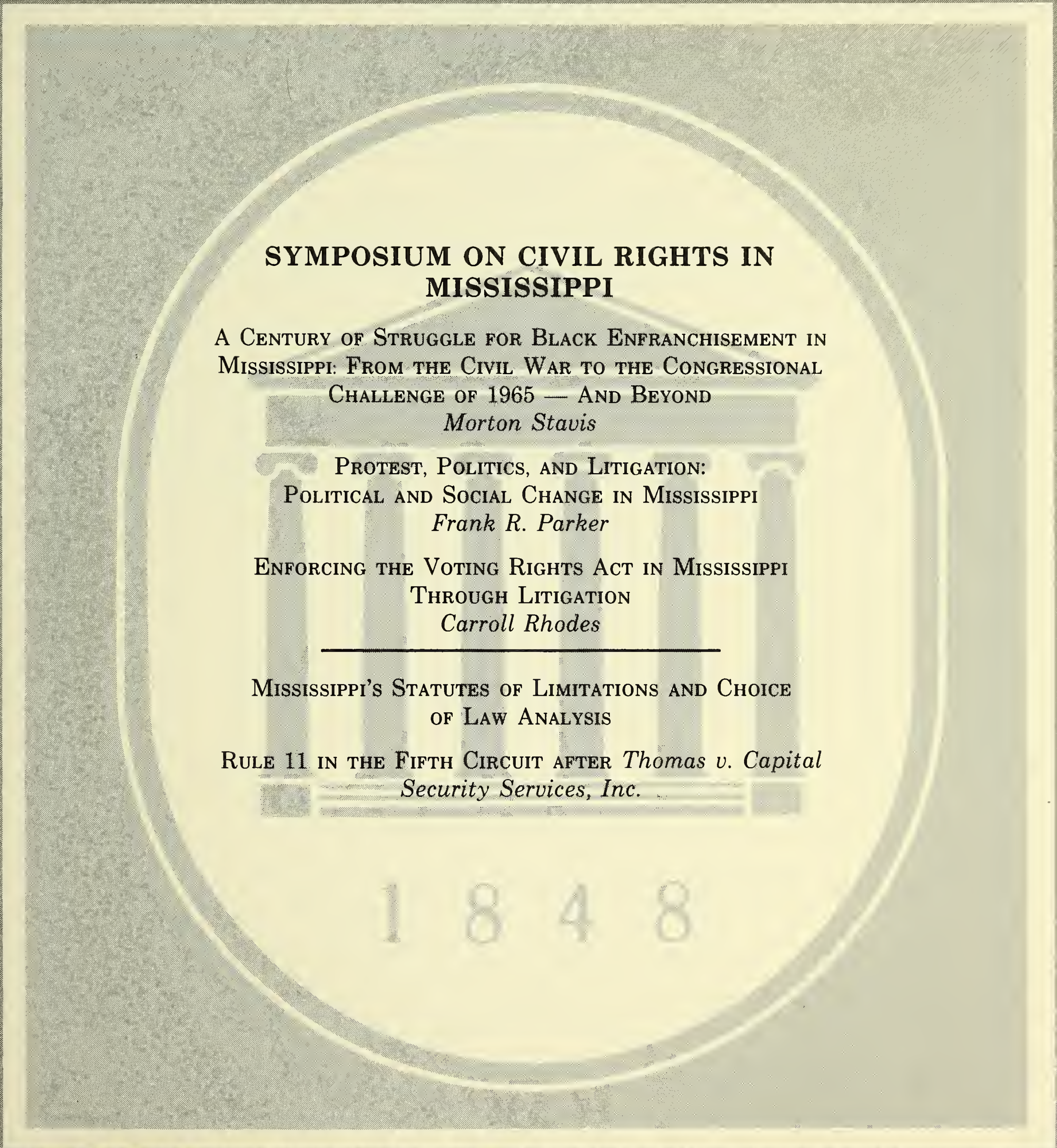

SYMPOSIUM ON CIVIL RIGHTS IN MISSISSIPPI

A CENTURY OF STRUGGLE FOR BLACK ENFRANCHISEMENT IN MISSISSIPPI: FROM THE CIVIL WAR TO THE CONGRESSIONAL CHALLENGE OF 1965 — AND BEYOND
Morton Stavis

PROTEST, POLITICS, AND LITIGATION: POLITICAL AND SOCIAL CHANGE IN MISSISSIPPI
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MISSISSIPPI'S STATUTES OF LIMITATIONS AND CHOICE OF LAW ANALYSIS

RULE 11 IN THE FIFTH CIRCUIT AFTER *Thomas v. Capital Security Services, Inc.*

VOLUME 57 **DECEMBER 1987** **NUMBER 3**

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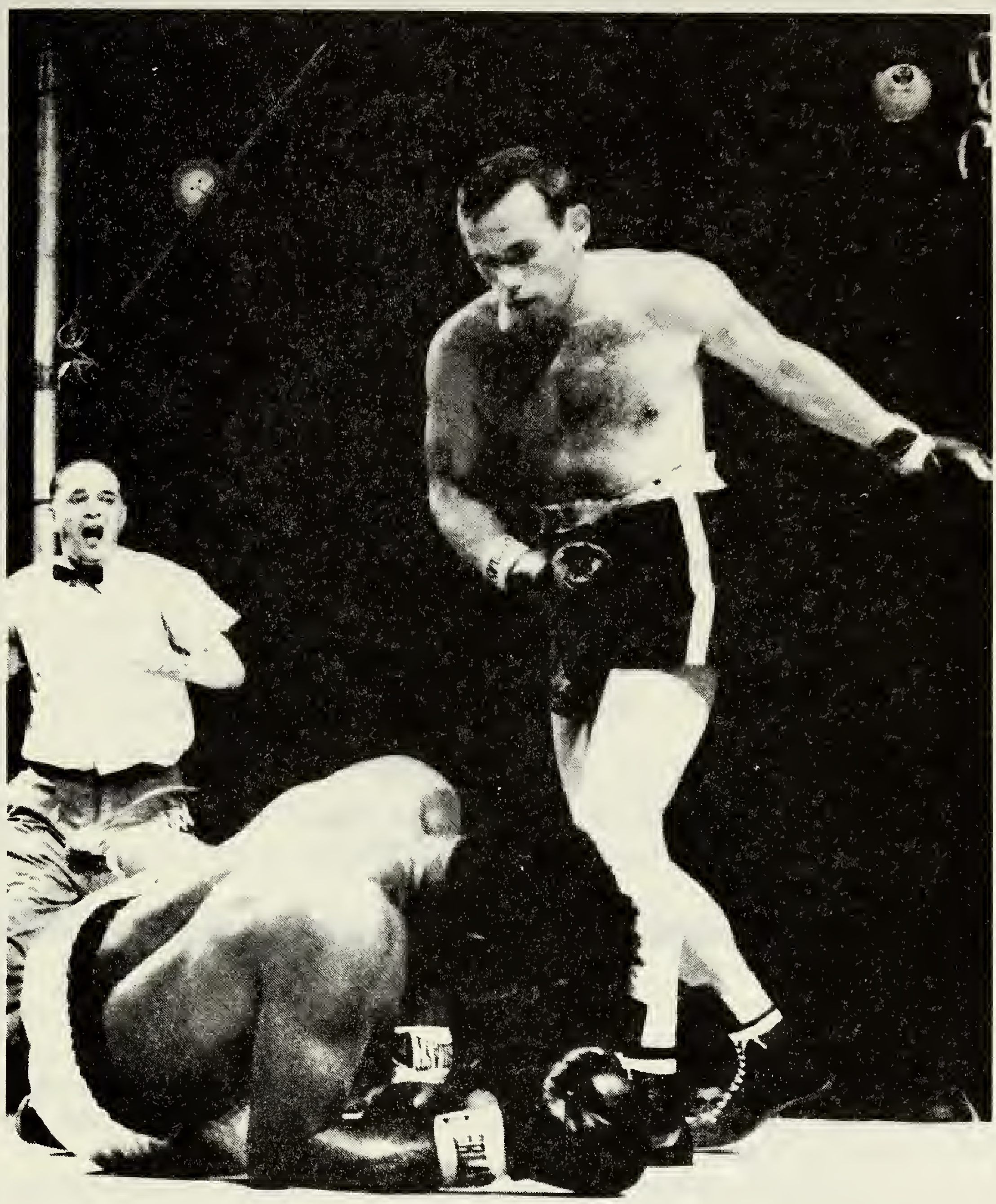

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Symposium on Civil Rights in Mississippi

FOREWORD

This issue of the *Mississippi Law Journal* was initially conceived of as a forum for articles examining the current status of Civil Rights, in the context of those rights generally associated with the Civil Rights Act and the Voting Rights Act, a quarter of a century after the civil rights movement. In fleshing out this concept, it became readily apparent that the history, society and politics of Mississippi are permanently entwined in the recognition and development of these rights, and will be forever changed as a result. It is indeed, then, our great fortune to publish articles by Morton Stavis, Frank R. Parker and Carroll Rhodes, each having actively participated in this development.

We have undertaken this project aware that it will suffer criticism as being topically "too sensitive," of little relevance to the average practitioner, or simply as being more suitable for publication in a history journal than in a law journal.

In proceeding with this issue, we concluded that greater harm is done by simply ignoring the blemishes in our reflection than in recognizing and contemplating the significance of their presence. Further, although it is tempting to measure relevance in denominations of billable hours, it should be remembered that law at its base level is little more than the resolution of tension between competing individual interests. Viewed from that perspective, the relevance of this topic is undeniable. Finally, we are reminded daily that this topic is not only of historical importance; rather, it reverberates constantly through the whole of our society. And it is only with an understanding of the past that we can appreciate the present and anticipate the future.

Understanding, appreciation and anticipation provide the unifying theme of the articles within. As stated by Frank Parker:

> The changes that have been achieved provide a firm basis for future progress. Whether these changes will continue, or

whether the society will regress, depends on future developments.

A CENTURY OF STRUGGLE FOR BLACK ENFRANCHISEMENT IN MISSISSIPPI: FROM THE CIVIL WAR TO THE CONGRESSIONAL CHALLENGE OF 1965 — AND BEYOND

*Morton Stavis**

The year 1965 witnessed an unusual legal and political contest in Mississippi and Washington, D.C. The congressional challenge of that year, through which Mississippi blacks sought the unseating of the entire Mississippi congressional delegation, was a bold step by blacks determined to establish their right to vote and participate in the electoral process in Mississippi. The congressional proceeding was based upon facts which had been exposed for all to see: after blacks in Mississippi received the right to vote as part of Reconstruction, they were obstructed from exercising that right beginning in 1875, and from 1890 to 1965 they were effectively denied the franchise.[1]

---

* B.S., CCNY 1933; LL.B., Columbia University 1936; President, Center for Constitutional Rights, New York, New York.

The author, then a practicing attorney in Newark, New Jersey, was one of the attorneys for the congressional challenge. Others were Arthur Kinoy and William M. Kunstler, both of New York, Benjamin E. Smith of New Orleans, and William Higgs of Washington, D.C., previously of Mississippi. The legal team was augmented by Bruce W. Waltzer of New Orleans and Daniel Crystal of New Jersey who participated in preparing the brief which was presented to the House of Representatives. Portions of this article are based on that brief.

The author wishes to express his appreciation to Meredith Gowan, a student at the University of Mississippi Law School, who has rendered invaluable assistance in the preparation of this article; to Professor George Cochran of that Law School for his many helpful suggestions throughout the research and writing of this article; to Professors Douglas L. Colbert of Hofstra Law School; Eric Foner of Columbia University; Randall Kennedy of Harvard Law School; J. Morgan Kousser of the California Institute of Technology; W. Charles Sallis of Millsaps College, Jackson, Mississippi; Anthony Scott of Rutgers University; C. Vann Woodward of Yale University and Victoria Gray Adams, one of the contestants in the challenge, for their close reading of earlier drafts of this article and their many helpful comments and to Professor Kousser for his graciousness in making available some of his research notes which were of great assistance in developing the historical background of the suffrage issue in Mississippi; and to Frank Parker of the Lawyers Committee for Civil Rights Under Law, Armand Derfner, formerly of the Lawyers Constitutional Defense Committee, C. Victor McTeer and Margaret Carey, both associated with the Center for Constitutional Rights, all of whom were particularly helpful in counseling the author with respect to the extensive litigation in Mississippi relating to the enforcement of the Civil Rights Act of 1965.

The legal significance of the challenge was its resort to an old but once-effective remedy for the exclusion of blacks from the political process. Its political significance was that in its effort to reverse ninety years of disfranchisement of blacks in southern states, the challenge elevated the battle for voting rights to the summit of representational government. The courts in the 1960's deliberately but not too effectively sought to undo the exclusion of blacks from the voting process through an unending series of cases county by county, and in some instances statewide.[2] Through the challenge, Mississippi blacks turned to Congress and sought relief from the legislative branch of government, not by way of a new law but rather through the controls that Congress has over its own membership. In so doing they harkened back to precedents from Reconstruction and the period immediately following when Congress was still trying to stop the persistent movement to disfranchise blacks. One of the most prominent of those precedents was the case of *Lynch v. Chalmers*,[3] coming out of the then sixth congressional district of Mississippi in the 47th Congress.

While the long and tortuous history of the battle for political rights of blacks has been the subject of much study and writing, the 1965 challenge is mentioned only briefly in some of the historical studies of the 1960's civil rights movement,[4] in writings by some of the leaders of the Mississippi Freedom Democratic Party,[5] and in autobiographical works by two of the attorneys for the congressional challenge.[6] Its factual and legal underpinnings have not, however, been presented in detail in any published work. This article will, to some extent, fill that gap and place the challenge in the context of the long struggle for black suffrage in the South.

---

[1] *See infra* notes 53, 154 and accompanying text.

[2] *See infra* notes 129-52 and accompanying text.

[3] 2 HINDS § 959 p. 263, Rowell's Digest 375, 47th Cong., 1st Sess. (Miss. 1882).

[4] *See* H. ZINN, SNCC THE NEW ABOLITIONISTS 257-61 (1965)(describing challenge); McMillen, *Black Enfranchisement in Mississippi: Federal Enforcement and Black Protest in the 1960's*, 43 J. S. HIST. 351 (1977)(same).

[5] *See* Guyot and Thelwell, *The Politics of Necessity and Survival in Mississippi*, 6 FREEDOMWAYS 120, 120 (1966)[hereinafter *Politics of Necessity*](explaining theoretical

I. The Failure of the Thirteenth, Fourteenth and Fifteenth Amendments to Protect the Voting Rights of Black People in the South from 1875 Onward

Though the Civil War amendments - the thirteenth, fourteenth and fifteenth amendments - were intended not only to prohibit slavery but also to grant full political rights to the freed slaves,[7] their implementation was frustrated by a sequence of historic events.

A. The Battle for Voting Rights for Blacks at the End of the Civil War-Reconstruction

The Civil War had barely ended with the surrender at Appomattox in April, 1865, when the question of suffrage for black males in the South emerged as a key issue in the development of the responses of the state and federal governments to the struggles of blacks for political rights. President Lincoln, who had been planning for the return of the southern states to the Union even before the end of the war, believed that fixing the terms was within presidential authority.[8] In exercising that authority,

---

and practical reasons for challenge and its political effects); Guyot and Thelwell, *Toward Independent Political Power*, 6 Freedomways 246, 247-50 (1966)[hereinafter *Political Power*](describing challenge and its political effects); Minnis, *A New Declaration of Independence*, 5 Freedomways 264, 272-76 (1965) (challenge was opportunity to change American political scene radically by making it representative of grass roots people).

[6] A. Kinoy, Rights on Trial 257-96 (1983); W. Kunstler, Deep in My Heart 324-53 (1966).

[7] The Journal of the Joint Committee of Fifteen on Reconstruction, 23, 42, 213 (B. Kendrick ed. 1914).

[8] As early as December 1863, after a substantial segment of the seceded states was under federal occupation, President Lincoln issued his proclamation of amnesty and reconstruction which essentially provided that he would recognize a government organized by any group of persons who took an oath of loyalty to the federal government and constituted at least ten percent of the votes cast in the presidential election of 1860. K. Stampp, The Era of Reconstruction 1865-1877 39 (1965). "Lincoln's plan excluded all

both Lincoln and President Johnson, who succeeded him, took a fairly lenient attitude towards the conditions of such return.[9] The result of this leniency was that between 1865 and 1867 new governments were established which did not permit black suffrage. These governments were dominated by ex-confederates who adopted restrictive "Black Codes" to govern the conduct of the newly freed slaves.[10] Under slavery, educating blacks to read

---

Negroes from participation either in oath-taking, voting, or holding office. Governments under presidential reconstruction were to be governments by white men." J.H. FRANKLIN, RECONSTRUCTION: AFTER THE CIVIL WAR 18 (1961). Even before the end of the Civil War, Lincoln had accepted as reconstructed Louisiana, Arkansas, Tennessee and Virginia, but Congress refused to accept their representatives. *Id.* at 22-26. Congress, meanwhile, had adopted a plan requiring a fifty percent support of a new constitution (the Wade-Davis Bill). *Id.* at 19. Lincoln allowed that plan to die by pocket veto. *Id.* at 20. Although Lincoln at first ignored the question of black suffrage, that issue had in fact become important as of 1863-64. *See* L. COX, LINCOLN AND BLACK FREEDOM: A STUDY IN PRESIDENTIAL LEADERSHIP (1981). Lincoln did not have a "fixed plan" for reconstruction but rather explored different approaches "all in an attempt to quicken victory and secure the abolition of slavery rather than to fashion a blueprint for the post-war South." E. FONER, RECONSTRUCTION 1863-1877: AMERICA'S UNFINISHED REVOLUTION, at 73 (1988). Toward the end of his life, however, he came out for limited black suffrage. *Id.* at 74.

President Johnson's reconstruction plan was even more lenient than Lincoln's; he did not require as much as ten percent support of a new constitution. J.H. FRANKLIN, *supra*, at 30-31. By the summer of 1865, Johnson had accepted new governments in Virginia, North Carolina, Mississippi, Georgia, Alabama, South Carolina, and Florida. *Id.* at 41-42. The franchise was not extended to black people in those states and Johnson did not press the issue; instead, he claimed that on this issue the South "must have time to understand its new position." *Id.* at 43. By the end of 1865, Johnson considered the task of reconstruction to be complete: governments were functioning, courts and post offices were operating, and it was the duty of Congress to seat their Senators and Representatives. K. STAMPP, *supra*, at 64. Congress, however, refused to do so. *Id.* at 64-65.

[9] J.H. FRANKLIN, *supra* note 8, at 18, 41-43.

[10] An essential feature of the "Black Codes" was a series of provisions to control workers. Carl Schurz, reporting in 1865, saw southern perceptions of the problem as follows:

> It is that the [N]egro exists for the special object of raising cotton, rice and sugar for the whites, and that it is illegitimate for him to indulge, like other people, in the pursuit of his own happiness in his own way. Although it is admitted that he has ceased to be the property of a master, it is not admitted that he has a right to become his own master . . . .
>
> It is, indeed, not probable that a general attempt will be made to restore slavery in its old form . . . but there are systems intermediate between slavery as it formerly existed in the South, and free labor as it exists in the [N]orth, but more nearly related to the former than to the latter, the introduction of which will be attempted . . . .

V. WHARTON, THE NEGRO IN MISSISSIPPI, 1865-1890 82 (1947).

The Black Codes which emerged in Mississippi included a law, administered by local and write had been a crime,[11] and the new governments made no provision for the education of the newly freed slaves.[12]

Negative congressional reaction to President Johnson's Reconstruction policy,[13] including the rejection of the proposed fourteenth amendment by southern states acting with the support of the President,[14] led to confrontations between the President and Congress over Reconstruction policy and eventually to an impeachment trial which President Johnson survived by one vote.[15] Following a substantial gain of strength by Republicans in the election of 1866, Congress took over the direction of Reconstruction and shifted its focus so that black male suffrage became the cornerstone of the program. Through a statute passed in March of 1867,[16] Congress imposed military rule over the for-

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courts, providing for the bonding out of minor black children as apprentices. *Id.* at 84. The former owner of the minor was to have preference if he was a suitable person for the purpose. *Id.*

[11] K. Stampp, *supra* note 8, at 79-81.

[12] South Carolina v. Katzenbach, 383 U.S. 301, 311 n.10 (1966).

[13] The political leadership of Mississippi, based on assurances from President Johnson, assumed that all that was required to re-establish a normal relationship with the national government was the abolition of slavery and the repudiation of secession. Johnston, *Suffrage and Reconstruction in Mississippi*, 6 Pub. Miss. Hist. Soc'y 141, 141 (1902). In the view of that leadership, suffrage for blacks was not required and had only limited support in Congress. *Id.* at 142-43. The initial approach of Congress was to request the states to ratify the fourteenth amendment, which did not require black suffrage; rather, it provided in § 2 for a proportionate reduction of representation in Congress to the extent of the disfranchisement of any male citizen of a state. *Id.* at 149-51. In view of the section of the Constitution counting a black person as three-fifths of a person for apportioning representation in Congress (Art. I, § 2), such a provision was necessary to prevent an *increase* in southern representation by the mere emancipation of the slaves even if they were barred from voting. *Id.*

In the opinion of the author of this 1902 article (who strongly opposed the idea of black suffrage), the southern states blundered when they refused to accept the fourteenth amendment and were insensitive to the feelings of the country thereby contributing to bringing on the Radical Reconstruction program enacted by Congress in 1867. *Id.* at 167. It is doubtful that so simple an explanation, which takes no account of the very complex economic and political currents of the time, is an adequate analysis of the onset of Reconstruction.

An extensive review of the history and meaning of the fourteenth amendment appears in two opposing opinions in Oregon v. Mitchell, 400 U.S. 112 (1970). *See* opinions of Justice Harlan at 152 and of Justice Brennan at 229.

[14] H. Trefousse, Reconstruction: America's First Effort at Racial Democracy 38 (1971).

[15] E. McKitrick, Andrew Johnson and Reconstruction 507 (1960).

[16] An Act to provide for the more efficient Government of the Rebel States. Act of

mer Confederate states, subject to the holding of state constitutional conventions.[17] Suffrage had to be guaranteed for black males in the election of delegates to the conventions as well as in the constitutions adopted.[18] Upon the adoption of the constitution and the ratification of the fourteenth amendment, which the southern states had earlier rejected, the state could be readmitted to the Union and its representatives and senators could be seated.[19]

The 1869 Constitution adopted in Mississippi to comply with the foregoing requirements was promulgated by the so-called "Black and Tan Convention," to which 100 delegates were elected, sixteen of them black.[20] This constitution established a state-supported system of public schools, conferred full citizenship upon blacks, and guaranteed the protection of blacks' civil rights.[21] On the basis of this constitution, Mississippi regained

---

March 2, 1867, 14 Stat. 428, 39th Cong., 2nd Sess.

[17] H. NASH, JR., ANDREW JOHNSON: CONGRESS AND RECONSTRUCTION 117-25 (1972).

[18] BLACK RECONSTRUCTIONISTS 1ST 1 (E.L. THORBOUGH ed. 1972).

[19] J.H. FRANKLIN, *supra* note 8, at 80-82. At the same time, Congress enacted the Civil Rights Act, which vastly extended federal court jurisdiction, in the hope of dealing with "the Black Codes and the maladministration of southern criminal and civil justice." Zeigler, *A Reassessment of the Younger Doctrine in Light of the Legislative History of Reconstruction*, 1983 DUKE L.J. 987, 995, 996 n.58.

[20] Despite the vilification directed at the Reconstruction governments and the charge of control by blacks, the conventions which established these governments were by no means so ruled. Delegates to the conventions which established the Reconstruction constitutions had the following racial breakdowns:

	Black	White
Alabama	18	90
Arkansas	8	58
Florida	18	27
Georgia	33	137
Louisiana	49	49
Mississippi	16	84
North Carolina	15	118
South Carolina	76	48
Virginia	25	80
Texas	9	81

K. STAMPP, *supra* note 8, at 169 n.9. Slight differences in this tabulation appear in E. FONER, *supra* note 8, at 318 n.70.

Louisiana, Mississippi and South Carolina at the time had majority black populations. K. STAMPP, *supra* note 8, at 167.

[21] Sansing, *Mississippi's Four Constitutions*, 56 MISS. L.J. 1, 8-9 (1986).

its representation in Congress in February of 1870.[22] The state was readmitted on the "fundamental" condition that its constitution would never be amended so as "to deprive any citizen or class of citizens of the United States of the right to vote who are entitled to vote by the Constitution herein recognized . . . ."[23] Blacks in Mississippi, as in other southern states, responded to the provisions of the 1869 constitution by registering and voting in large numbers.[24] The so-called "Radical Republican" governments that were elected as a result of these new constitutions included blacks but it was hardly the fact that they dominated.[25] Regardless of reality, the Reconstruction governments have been the subject of enormous calumny, with charges of gross fraud and corruption.[26] More recent scholarly works indicate that these conditions, to the extent that they existed, reflected the general low level of public morality throughout the nation during that period, not the fact that blacks participated in the governments.[27] Moreover, there seems little doubt that on some is-

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[22] 1 DOCUMENTARY HISTORY OF RECONSTRUCTION 487-88 (N. FLEMING ed. 1906); *see also*, J.H. FRANKLIN, *supra* note 8, at 231.

[23] CONG. GLOBE, 41st Cong., 2d Sess. 1013-14, 1356-66 (1870). The fifteenth amendment, adopted in 1870, assured the right of black citizens in all states to vote independently of this conditional return of the rebel states. As of the end of the Civil War blacks were disfranchised in many northern states. Oregon v. Mitchell, 400 U.S. 112, 156 (1970). For an analysis of legislation approved by Congress in the 1870's to protect the right to vote, see Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 526-27 (1973). *See generally* R. Kaczorowski, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE AND CIVIL RIGHTS, 1866-1876 (1985)(civil rights enforcement during this period).

[24] V. WHARTON, *supra* note 10, at 157. In 1867 General Ord began the registration of blacks. W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA 434 (1935).

[25] The Reconstruction state governments which emerged after those conventions produced one black governor in Louisiana, for 35 days; three states had black lieutenant governors, two had state treasurers, four had superintendents of education, three had secretaries of state. E. FONER, *supra* note 8, at 353. Except for the lower house of South Carolina, all legislative bodies had a majority of white members. *See* K. STAMPP, *supra* note 8, at 167.

Blacks were not in control of the state governments at any time anywhere in the South. They held public office and, at times, played important parts in the public life of their respective states. But it would be stretching a point to say that their roles were dominant, and it would be hopelessly distorting the picture to suggest that they ruled the South. J.H. FRANKLIN, *supra* note 8, at 133-38.

Aligned with the blacks in uncertain coalitions were the so-called Carpetbaggers (recent northern settlers in the South who actively supported the Radical Republicans) and Scalawags (white southerners who collaborated with the Radicals). K. STAMPP, *supra* note 8, at 158-60. Recent scholarship questions the accepted condemnation of Carpetbaggers. *See* R. CURRENT, THOSE TERRIBLE CARPETBAGGERS (1988). And the pejorative term "Scalawag" is hardly a fair generalization since there were in fact a number of able, honorable and prominent southern whites who joined the Republican Party, with which most of the blacks at the time were affiliated. K. STAMPP, *supra* note 8, at 158-61.

---

[26] Lord Bryce's comments on the southern state governments created under the radical plan of Reconstruction were not untypical:

> Such a Saturnalia of robbery and jobbery has seldom been seen in any civilized country . . . . The position of these [radical] adventurers was like that of a Roman provincial governor in the latter days of the Republic . . . . [All] voting power lay with those who were wholly unfit for citizenship, and had no interest as taxpayers, in good government . . . . [Since] the legislatures were reckless and corrupt, the judges for the most part subservient, the Federal military officers bound to support what purported to be the constitutional authorities of the State, Congress distant and little inclined to listen to the complaints of those whom it distrusted as rebels, greed was unchecked and roguery unabashed.

II J. BRYCE, THE AMERICAN COMMONWEALTH 476-78 (1888).

This was to become the consensus of the early historians of the Reconstruction period. K. STAMPP, *supra* note 8, at 155. "[Indeed] [i]n a pocket history of the United States distributed to American servicemen overseas during World War II, two eminent historians (Allan Nevins and Henry Steele Commager) said that the Reconstruction state legislatures were probably the worst that had ever been known in any English-speaking land." RECONSTRUCTION 9 (S. Lynd ed. 1967).

[27] Modern scholarship has rejected the claim that the period of Republican power was one of profound corruption and inefficiency:

> Seldom has the truth been so distorted . . . . The graft that took place in the South must be set in a national context. All the Southern governments combined probably stole less from the taxpayers than did the Tweed Ring in New York. The South Carolina and Louisiana legislators were more erratic but perhaps no more corrupt than those of New York and Pennsylvania. Southern railroad "rings" could not hold a candle to the operations of Jim Fisk and Jay Gould with the Erie Railroad. The postwar era of relaxed standards and entrepreneurial aggressiveness affected the South as it affected the rest of the country.

J. MCPHERSON, ORDEAL BY FIRE 561, 563 (1982). *See also* C. V. WOODWARD, ORIGINS OF THE NEW SOUTH 1877-1913, 66-74 (1964) (discussing corruption in Republican Reconstruction governments).

The historiography of this period has been the subject of separate study. *See* RECONSTRUCTION, *supra* note 26, at 1-9; K. STAMPP, *supra* note 8, at 3-23 (chapter one entitled "The Tragic Legend of Reconstruction"). The standard works by most historians from the late nineteenth century until about 1950 accepted the thesis that the Reconstruction period was a disaster. Among the descriptive terms used were "the tragic era," "the dreadful decade," "the age of hate," "the blackout of honest government," the "nadir of national disgrace." These historians included very respected scholars, such as Claude Bowers, author of THE TRAGIC ERA (1929), James Ford Rhodes, author of a seven-volume HISTORY OF THE UNITED STATES SINCE THE COMPROMISE OF 1850 (1893-1906), William sues the Reconstruction governments made some significant contributions.[28]

B. The Violent Counter-Reconstruction of 1875

Regardless of the strengths and weaknesses of the Reconstruction governments, a violent counter-Reconstruction was the response.[29] It was the heyday of the Ku Klux Klan and numer-

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Dunning of Columbia University, author of RECONSTRUCTION: POLITICAL AND ECONOMIC, 1865-1877 (1906), E. Merton Coulter, author of THE SOUTH DURING RECONSTRUCTION, 1865-1877 (1947), and others. More recent works which have given a different and positive perspective as to the history of that period include W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA (1935), J.H. FRANKLIN, *supra* note 8; J.M. KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH (1974); K. STAMPP, *supra* note 8. One of the earliest writers of this bent was John R. Lynch, the black Congressman from Mississippi. In unceasing efforts to correct the negative view of the Reconstruction period provided by historians, he wrote THE FACTS OF RECONSTRUCTION (1913); *Some Historical Errors of James Ford Rhodes*, 2 J. NEGRO HIST. 345 (1917); *More About the Historical Errors of James Ford Rhodes*, 3 J. NEGRO HIST. 139 (1918); *The Tragic Era*, 16 J. NEGRO HIST. 103 (1931). E. FONER, *supra* note 8. Professor Foner's book is the most recent major work on the Reconstruction period. In his comprehensive analysis of the complex economic and political currents of the time, he emphasizes "the centrality of the black experience" and the fact that "blacks were active agents in the making of Reconstruction." E. FONER, *supra* note 8 at Preface XXIV.

In the welter of academic debates of the pros and cons of the various actors in the Reconstruction period,

> . . . a third point of view is in the process of crystallizing. It seeks to escape the debate as to whether Northern policy was too soft or too hard by contending that it was hard in the wrong way, or more precisely, in the wrong area of social life. This third view holds that the fundamental error in Reconstruction policy was that it did not give the freedman land of his own. Whether by confiscation of the property of leading rebels, by a vigorous Southern homestead policy, or by some combination of the two, Congress should have given the ex-slaves the economic independence to resist political intimidation. Lacking such an economic substratum, manhood suffrage was inevitably artificial; supported by the presence of Union soldiers, it collapsed when they were withdrawn.

RECONSTRUCTION, *supra* note 26, at 8. *See also* K. STAMPP, *supra* note 8, at 125-26 (description of short-lived experiment in land distribution of Davis Bend, twenty-five miles south of Vicksburg). V. WHARTON, *supra* note 10, at 38-41 (same).

[28] The thirst of blacks for education, which was denied to them as slaves, is evidenced by the fact that each Reconstruction constitution provided for free education. J.H. FRANKLIN, *supra* note 8, at 110.

[29] *See* United States v. Price, 383 U.S. 787, 803-04 (1966). For a discussion of the general impact of violence upon Reconstruction politics in different areas of the South during this period, see E. FONER, *supra* note 8.

ous other terrorist organizations.[30] As described by John Hope Franklin, "It had looked as though the Civil War would break out anew as Democrats resorted to every possible device to overthrow the Radicals."[31] Unrelenting, violence-supported pressure by southerners under the banner of "redemption" combined with the steady change of attitude by northerners who were prepared to "let the South alone" resulted in a sharp diminution of federal protection for the rights of blacks.[32]

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[30] The Klan was born in Tennessee in 1865. H. CARTER, THE ANGRY SCAR 197 (1959). It spread throughout the South and became an important instrumentality against the Radical Republicans. *Id.* at 198-200. Eventually, congressional investigations produced legislation, generally referred to as the Force Acts (May 31, 1870, Feb. 28, 1871) and the Ku Klux Klan Act (April 20, 1871); 42 U.S.C. §§ 1983 and 1985 are the remnants of this legislation. Although prosecution under these statutes had a substantial effect on the Klan as a formal organization operating under its own name, activities similar in nature were carried out by groups operating under other names such as the Knights of the White Camelia, the Young Men's Democratic Clubs and the Knights of the Rising Sun. 1 A. TRELEASE, WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION 51 (1971). The Klan as such was revived in 1915 after the lynching of Leo Frank. *Cf.*, Frank v. Mangum, 236 U.S. 309 (1915)(affirming conviction of Frank whose death sentence was thereafter commuted to life imprisonment, following which he was lynched). *See generally* L. DINNERSTEIN, THE LEO FRANK CASE (2d ed. 1988); Turner, *The Ku Klux Klan, A History of Racism and Violence*, KLANWATCH 14-16 (1981).

[31] J.H. FRANKLIN, FROM SLAVERY TO FREEDOM 265 (1956).

[32] The grim story of the violent revolution of 1875 in Mississippi is told in great detail in V. WHARTON, *supra* note 10, at 181-98. The most brutal violence, combined with threats and economic pressure, was directed at the black people of the state. *Id.* at 186-87. Pleas to the federal government by the governor were ignored. *Id.* at 193. The Republican Party perceived that "Negro suffrage, or even Negro freedmen, had never been really popular with the masses in the North," and there were other political battles that would be adversely affected if the federal government intervened. *Id.* Twenty years later Adebert Ames, governor of Mississippi during the revolution, made it clear that, regardless of what was said, the driving force was a racial struggle:

> There was a time when policy made it advisable for the white men of Mississippi to advance "corruption," "[N]egro mobs," anything and everything but the true reason for their conduct. That time has long since passed. There is no good reason why the truth should not be stated in plain terms.
>
> It is this — they are white men, Anglo Saxons — a dominant race — educated to believe in [N]egro slavery. To perpetuate the then existing order of things they ventured everything and lost. An unjust and tyrannical power (from their standpoint) had filled their state with mourning, beggared them, freed their slaves and as a last insult and injury made the ex-slave a political equal. They resisted by intimidation, violence and murder. Excuses by the way of justification were given while the powerful hand of the national government was to be feared. Soon the national government and public opinion ceased to be dreaded. They then announced boldly that this is a white man's government and that

The Hayes-Tilden compromise of 1877[33] marked the end of Reconstruction and was an acknowledgement that, as far as the federal executive branch of the government was concerned, whites were to be given full power to control the South.[34]

> the [N]egro and ex-slave should, forever, form no part of it.
>
> This determination has been proclaimed time and again and what is more to the purpose has been acted on. With an excess of 60,000 colored people, Mississippi became the seat of a white man's government.

Id. at 197-98.

The refusal of President Grant to intervene in Mississippi's violent revolution of 1875 marked a milestone in the retreat from Reconstruction. E. FONER, *supra* note 8, at 562-63.

[33] *See* C.V. WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION 3 (1951) (describing Hayes-Tilden bargain of 1877). The presidential election of 1876 was fraught with violence and fraud and in a few critical southern states, with conflicting certifications as to who had won the election. The inconclusiveness of the election resulted in the congressional appointment of a bipartisan electoral commission to settle the matter. D. BROWN, THE YEAR OF THE CENTURY: 1876 333 (1966). Extensive negotiations produced a deal by which the Republican Rutherford B. Hayes was elected president upon his commitment effectively to put an end to federal protection of the rights of blacks in the South. *Id.* at 323-28. While the precise terms of the deal remain impossible to determine, federal troops were removed from the state houses of Louisiana and South Carolina where they were protecting Republican claims to governorships. E. FONER, *supra* note 8, at 582. Commitments were also made for financial aid to the South to bolster its economic life. *See* C.V. WOODWARD, *supra*, at 7-8 (1951).

[34] In 1981, when Congress was considering extension of the Voting Rights Act of 1965, the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee received the testimony of two of the leading historians of the post-Civil War era, C. Vann Woodward of Yale University and J. Morgan Kousser of the California Institute of Technology. *See Extension of the Voting Rights Act: Hearings on H.R. 3112 Before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee*, 97th Cong. 1st Sess. (1981)[hereinafter *Hearings*]. Both professors explained that, when the Compromise of 1877 was made, political leaders sought to sugar-coat the demise of Reconstruction by reassuring blacks that there would be no interference with their right to vote. Thus, L.Q.C. Lamar, a powerful political figure in Mississippi at the time and considered one of the leaders of the 1875 overthrow of the Reconstruction government (ultimately a justice of the Supreme Court of the United States from 1888-1893) in an article that he wrote in 1879 said that the disfranchisement of blacks was "a political impossibility, under any circumstances short of revolution" and that even if it was possible, "the South would not permit it." Lamar, *Ought the Negro to be Disenfranchised*, N. AM. REV. 32, 41-42. Rutherford B. Hayes, the Republican President installed as a result of the Compromise, assured a black audience that "their rights and interests would be safer if this great mass of intelligent white men were left alone by the general government." *See Hearings, supra*, at 2004.

The particular concern of the historians testifying in 1981 was to demonstrate to Congress that the retreat made by the Supreme Court on the issue of voting rights for blacks in the case of City of Mobile v. Bolden, 446 U.S. 55 (1980), invited comparison with a wide range of devices that had been employed in the South to disfranchise black

C. Mississippi's 1890 Constitution — The "American Way"

The story does not end with the violent overthrow of the Reconstruction governments. Focusing in particular upon Mississippi, the success of the first "Mississippi Plan" brought into power white Mississippians who were determined to "control . . . the Negro vote to insure the continuation of white supremacy."[35] For the next fifteen years, by the extensive use of fraud, intimidation, and violence, whites easily controlled all state elections.[36]

Many Mississippians, although wholly sympathetic to the cause of white supremacy, were nevertheless revolted by these excesses. White supremacists had so trampled the state government underfoot by armed actions, including murder, that many Mississippians were concerned that their tactics would soon pollute the very sources of republican government.[37] There was a widespread desire to be free from the necessity of fraud and intimidation at the ballot box.[38] The solution was the constitu-

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people despite the foregoing assurances.

Congress, responding to a well-organized and broad-based civil rights constituency, voted to strengthen the Voting Rights Act and, more particularly, in § 2, replaced an "intent" test as specified in *Bolden* with a "results" test. 42 U.S.C. § 1973 (1982).

[35] E. FONER, *supra* note 8, at 559-563; W. HARRIS, THE DAY OF THE CARPETBAGGER: REPUBLICAN RECONSTRUCTION IN MISSISSIPPI 676-690 (1979).

[36] W. GILLETTE, RETREAT FROM RECONSTRUCTION, 1869-1879, 153-54, 162-63 (1979); G. RABLE, BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION, 144-62 (1984).

[37] McNeily, *History of the Measures Submitted to Committee on Elective Franchise, Apportionments, and Elections in the Constitutional Convention of 1890*, 6 PUB. MISS. HIST. SOC'Y 129, 130 (1902).

[38] Coleman, *The Origin of the Constitution of 1890*, reprinted from 19 J. MISS. HIST. 69, 81 (1957)(Coleman, subsequently governor of Mississippi (1956 to 1960) and thereafter judge of the United States Court of Appeals for the Fifth Circuit, was chief counsel for the contestees in the 1965 congressional challenge). In the article he quotes Judge J.B. Chrisman, a member of the constitutional convention of 1890 as follows:

> Sir, it is no secret that there has not been a full vote and a fair count in Mississippi since 1875, that we have been preserving the ascendancy of the white people by revolutionary methods. In other words, we have been stuffing ballot boxes, committing perjury, and here and there in the state carrying the elections by fraud and violence. The public conscience revolted, thoughtful men everywhere foresaw that there was disaster somewhere along the line of such a policy as certainly as there is a righteous judgment for nations as well as men. No man can be in favor of perpetuating the election methods which have prevailed in Mississippi since 1875 who is not a moral idiot.

tional convention of 1890.

Lawlessness was not, however, the sole motivating factor for the second "Mississippi Plan," the adoption of the 1890 constitution. For despite the use of violence and fraud, many of the blacks, who at the time made up the majority of the population, continued to vote. They were an important segment of the Republican Party and were sought out for electoral alliances by Independents, Populists, and other groups that were dissatisfied with the Democratic Party establishment.[39] Democrats were warned, "if whites split . . . the Negroes would hold the balance of power."[40] Ultimately, effective disfranchisement of blacks in order to prevent coalitions with dissident Democrats became the device for suppressing not only blacks but white dissidents as well.[41]

When the Mississippi Constitutional Convention of 1890 was called to order, there were 189,884 registered blacks as opposed to 118,890 registered whites.[42] Despite this fact, "[f]rom

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Id. at 82.

Coleman carefully adds, "Of course, not everyone in Mississippi agreed with this statement." *Id.*

[39] J. KOUSSER, *supra* note 27, at 35-36, 139.

[40] *Id.* at 36.

[41] *Hearings, supra* note 34, at 2012 (testimony of Prof. J. Morgan Kousser). Though they provided loopholes for some poor or illiterate whites by the grandfather and "fighting grandfather" clauses and the "understanding" clauses, they nevertheless meant to and did disfranchise large numbers of lower-status white people." *Id.*

Another consideration which prompted the convening of the 1890 convention was fear that the 1889 enhancement of the power of the Republican Party in Congress might lead to federal control of elections in Mississippi. V. WHARTON, *supra* note 10, at 208. President Harrison had called for federal control of southern elections in 1888 and 1889. The Lodge bill, H.R. 11045, 51st Cong., 1st Sess. (1890), essentially provided that in any election district where a specified number of voters petitioned the federal government, federal supervisors would be appointed. They would have the power to pass on the qualifications of challenged voters and to receive ballots which were refused by local officers. R. LOGAN, THE NEGRO IN AMERICAN LIFE AND THOUGHT — THE NADIR, 1877-1901 61 (1954). The bill passed the House but was sidetracked in the Senate and ultimately filibustered to death. *Id.* at 67. It was during the period of the sidetracking of the bill that the Mississippi constitutional convention proceeded.

[42] Jackson Clarion-Ledger, Sept. 16, 1890, at 1, col.4. The act passed by the Mississippi legislature calling for a constitutional convention provided that 134 delegates would be elected, one from each county, one from "each flotorial district in the same number as they were entitled to members of the house of representatives," and a remaining fourteen to be elected from the state-at-large. Coleman, *supra* note 38, at 89. One black Republican, Isiah Montgomery, a planter, was elected as a delegate from Bolivar County;

1875 to 1891 the Democratic Party held control of public affairs in Mississippi against a Negro majority of over 40,000 in the electoral body of the State."[43] Judge S.S. Calhoon, the president of the convention, was quite conscious of these figures when, seven months earlier, he urged that "[N]egro suffrage is an evil and an evil to both races [and that] [r]epeal of the constitutional clause conferring the ballot is of course the only sweeping and certain remedy."[44] Having been assured by its judiciary committee that the convention had the authority "to place any qualifications, or conditions, on the electoral franchise, provided only that they did not discriminate between the races,"[45] the convention promptly proceeded to adopt qualifications and procedures which were designed to and would effectively disfranchise blacks. Payment of a poll tax was made a prerequisite for voting largely because it was believed that a white man was more likely to pay it than a black man.[46] As a delegate observed, "The very idea of a poll qualification is tantamount to the State of Mississippi saying to the Negro: 'We will give you two dollars not to

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his seat was contested by a white Democrat. V. WHARTON, *supra* note 10, at 211. "[I]t was with Montgomery's vote that George and his group placed S.S. Calhoon in the chair [chairman of the convention] and gained the vital advantage of being able to organize the convention." *Id.*, citing Mississippi Constitutional Convention of 1890 Journal at 9. Montgomery was on the franchise committee and made a speech in support of the committee report which would cause the disfranchisement of 123,000 Negroes. *Id.* at 212.

[43] Johnston, *supra* note 13, at 146.

[44] S.S. CALHOON, *Negro Suffrage*, Times Democrat Letter to Editor (Feb. 22, 1890)(on file in Miss. Archives, Jackson, Miss.). The bitterness of feelings about black suffrage at the time of the constitutional convention was quite open. F.M.B. Cook, a black man, had been campaigning for election to the constitutional convention of 1890. His body was found riddled with bullets. The following is the report in the Jackson Clarion-Ledger of July 31, 1890:

> At the time of his death he was canvassing Jasper County as a Republican candidate for the Constitutional Convention, and was daily and nightly denouncing the white people in his speeches and caucuses . . . . Then one or more persons decided that Cook must die. The Clarion-Ledger regrets the manner of his killing, as assassination cannot be condoned at any time. Yet the people of Jasper are to be congratulated that they will not be further annoyed by Marsh Cook.

V. WHARTON, *supra* note 10, at 211.

[45] Johnston, *supra* note 13, at 216.

[46] Mabry, *Disenfranchisement of the Negro in Mississippi*, 4 J. SO. HIST. 318, 333 (1938).

vote.' "[47] The Supreme Court of Mississippi had little doubt that the objective of the poll tax was to curb voting by blacks.[48]

Others at the convention were not convinced that the poll tax alone would be sufficient to accomplish their purpose. They insisted on some sort of educational requirement that would disfranchise the blacks yet still permit illiterate whites to qualify.[49] The answer was the "interpretation of the constitution" test administered by local registrars whose determinations were, for all practice purposes, not reviewable.[50]

Even the Southern press called the obvious subterfuge a "disgraceful absurdity," a "manifest sham," a "shameless fraud" and a "cowardly and evasive makeshift."[51] But the convention delegates were more perspicacious than their detractors. They knew that they had created a new and effective method of sustaining white supremacy and disfranchising almost all blacks and a substantial number of poor whites.[52]

The 1890 constitution was never submitted to the people for ratification.[53] It was simply put into effect as the convention had drafted it.

By 1892, 68,127 of the 110,100 white males qualified as registered voters, but only 8,615 of the 147,205 black males over twenty-one were found eligible. According to historian C. Vann

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[47] U.S. CIVIL RIGHTS COMM'N, VOTING IN MISSISSIPPI 4 (1965)[hereinafter VOTING IN MISSISSIPPI].

[48] Ratliff v. Beale, 74 Miss. 247, 268, 20 So. 865, 869 (1896).

[49] *See* KOUSSER, *supra* note 27, at 143.

[50] *See* United States v. Duke, 332 F.2d 759 (5th Cir. 1964) (good description of reality of registration process implemented as late as early 1960's).

[51] C.V. WOODWARD, *supra* note 27, at 333 (quoting Gazette, Memphis Appeal, Vicksburg Post).

[52] A. KIRWAN, REVOLT OF THE REDNECKS: MISSISSIPPI POLITICS 1876-1925, 71 (1951). The elimination of a substantial number of whites was not unintended.

[53] C.V. WOODWARD, *supra* note 27, at 341. "[The Constitution] disfranchised the race that composed a majority of the population and it delivered a large majority of whites into the control of a minority of their own race in the black counties." *Id.*

In the pleadings filed in Williams v. Mississippi, 170 U.S. 213 (1898), counsel pointed out that the 1890 convention did not submit its new constitution to popular vote for adoption, as state law required, because of the preponderance of black voters under the Reconstruction suffrage laws. Rather the convention had it adopted by the legislature, which immediately vested in local officials wide discretion in choosing who could vote. Schmidt, *Juries, Jurisdiction, and Race Discrimination*, 61 TEX. L. REV. 1401, 1468 (1983).

Woodward:

> [R]oughly one Negro in seventeen and two whites in three were therefore qualified to vote provided they paid their poll tax — and kept the receipt! By this means a potential electorate of 257,305 was reduced to a potential electorate of 76,742 and a Negro majority of 37,105 converted into a white majority of 58,512.[54]

The Mississippi Plan, with heavy emphasis on literacy tests administered by local registrars, was so effective that it was widely copied by other southern states and, as Woodward puts it, was considered the "American Way."[55]

From 1890 to the 1960's, variants of the Mississippi Plan operated to perpetuate the system of white political domination based upon the substantial exclusion of black citizens from the electoral processes of a number of southern states. The "Plan" varied in its details over the years but never in essential operation. The utilization of registration and election laws constructed so as to permit local registrars to exclude black citizens from registration together with the ever-present atmosphere of terror, violence, and intimidation,[56] combined to achieve the

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[54] *Id.* at 344.

[55] C.V. WOODWARD, *supra* note 27, at 321-49. South Carolina followed in 1895; Louisiana in 1898; North Carolina, Alabama, Virginia and Georgia, all by 1910. J.H. FRANKLIN, *supra* note 8, at 236-37.

[56] There were constant reminders of what had occurred at an earlier period. Lynchings were a significant feature of this period of American life, at least until about the end of World War II. From 1852 to 1968 the nation experienced 4,742 lynchings, of which 3,445 were blacks. *See generally* R. ZANGRANDO, THE NAACP CRUSADE AGAINST LYNCHING, 1909-1950 (1980). The House of Representatives on three occasions (1922, 1937 and 1940) passed anti-lynching bills but none was ever brought to a vote in the Senate. *Id.* at 212. The first of such bills was introduced by Congressman Dyer in 1918. *Id.* at 43. This bill was designed to protect citizens and aliens and provided in brief "for jurisdiction in the federal courts to punish county officers and lynchers, and for the forfeiture to the United States of $10,000 by any county which is the scene of a lynching." Chadbourn, *Lynching and the Law*, 20 A.B.A.J. 71, 76 (1934).

Further, the Ku Klux Klan, which had a rebirth in 1915, *supra* note 30, achieved sufficient political power around 1924 to be considered very influential in both major party national conventions. In respect to the Republicans, the Klan effectively pressured the convention into not criticizing the organization. The Democratic convention of that year was thrown into pandemonium and fist fights about the Klan issue. The split in the party was so serious that it required 103 ballots before a compromise candidate could be chosen, and he was defeated in the general election of that year. W. WADE, THE FIERY openly expressed objective of the "Mississippi Plan," a white man's government based upon white man's rule.[57]

D. Unavailability of Judicial Relief Against Disfranchisement of Blacks

Efforts to obtain judicial relief against disfranchisement of blacks proved no more helpful than the repeated requests for relief from the executive branch of the government. In *Williams v. Mississippi*,[58] the Supreme Court dealt with provisions of the 1890 Mississippi Constitution in the context of reviewing a death sentence for murder imposed upon a black defendant by an all-white jury following an indictment by an all-white grand jury.[59] In *Williams*, it was contended that since jurors were required to be qualified electors, the defendant was denied equal protection because blacks were by all intent and result denied

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Cross 203-12 (1987). In 1924 the Klan was considered to have about two million members. D. Chalmers, Hooded Americanism: The History of the Ku Klux Klan 202 (1965). The Klan substantially declined in the late 1920's, mostly because of internal divisions. *See* Turner, *supra* note 30. It was revived again during the period of the civil rights movement of the 1960's and exists today in some areas of the country, not limited to the South. *Id.* at 43.

[57] The devastating and long-lasting impact of the 1890 constitution is revealed in the following table:

Black and White Registration Figures for Mississippi

Year	Negro voting age population	Negro registration	Percent of Negro voting age population registered	White voting age population	White registration	Percent of white voting age population registered
1867	98,926	60,167	66.9	84,784	46,636	55.0
1892	150,409	8,615	5.7	120,611	68,127	56.5
1896	198,647	16,234	8.2	150,530	108,998	72.4
1899	198,647	18,170	9.1	150,530	122,724	81.5
1955	495,138	21,502	4.3	710,639	423,456	59.6

For an interesting analysis of the disfranchisement of southern blacks as simply a more extreme example of nationwide programs to disfranchise lower classes by the introduction of registration programs, including literacy tests, see F. Piven and R. Claward, Why Americans Don't Vote 81 *et seq.* (1988).

[58] 170 U.S. 213 (1898).

[59] *Id.* at 213.

electoral rights under the state constitution.[60] The Court rejected the attack by pointing out that constitutions and statutes "do not on their face discriminate between the races, and it has not been shown that the actual administration was evil; only that evil was possible under them."[61] The case is viewed by historians as effectively representing the Supreme Court's approval of the Mississippi disfranchisement plan as embodied in the 1890 constitution.[62]

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[60] *Id.* at 215.

[61] *Id.* at 225. The disingenuousness of the court's opinion that evil administration had not been shown is evident from the fact that Cornelius J. Jones, counsel for Williams, filed a handwritten petition for rehearing in the Supreme Court (now on file in the National Archives), in which he asserted that in the court below the facts of discrimination were admitted. The rehearing petition was denied.

The *Williams* case was preceded by two other decisions, Smith v. Mississippi, 162 U.S. 592 (1896) and Gibson v. Mississippi, 162 U.S. 565 (1896), both involving appeals from murder convictions in Mississippi where the issue was essentially the same as in *Williams.*

Mr. Jones argued two of these cases (*Williams* and *Smith*) and appears as having been associated with E.M. Hewlett, who argued *Gibson.* These cases seem to have been the first in which black lawyers appeared before the United States Supreme Court. R. LOGAN, *supra* note 41, at 114.

Though records in the Supreme Court of the United States show an address in Washington, D.C. for Jones and a post office box in Greenville, Mississippi, no record of Jones has been found in the Department of History and Archives, Vol. I, ROWLAND, COURTS, JUDGES AND LAWYERS OF MISSISSIPPI, 1798-1935 (1935), or in V. WHARTON, *supra* note 10. The author is grateful to Professor J. Morgan Kousser for making available the results of his unpublished research at the National Archives about the *Williams* case.

[62] *See, e.g.*, C.V. WOODWARD, *supra* note 27, at 322-23. It should be noted that the Supreme Court in its opinion acknowledged that the Supreme Court of Mississippi had said of the 1890 constitution the following: "Within the field of permissible action under the limitations imposed by the Federal Constitution, the convention swept the field of expedients, to obstruct the exercise of suffrage by the [N]egro race." *Williams*, 170 U.S. at 222. And further the Mississippi court said, speaking of the [N]egro race:

> By reason of its previous condition of servitude and dependencies, this race had acquired or accentuated certain peculiarities of habit, of temperament, and of character, which clearly distinguished it as a race from the whites. A patient, docile people; but careless, landless, migratory within narrow limits, without forethought; and its criminal members given to furtive offenses, rather than the robust crimes of the whites. Restrained by the federal constitution from discriminating against the [N]egro race, the convention discriminates against its characteristics, and the offenses to which its criminal members are prone.

Williams, 170 U.S. at 222.

Having recognized the foregoing, the Supreme Court of the United States accepted the idea that discrimination against alleged characteristics of blacks was not discrimina-

The ultimate judicial negation of the suffrage rights of black people came in *Giles v. Harris*[63] in which by a six to three opinion the Supreme Court, speaking through Justice Holmes, decided that there was simply no judicial remedy available to deal with even the most blatant form of exclusion of blacks from the voting process.[64] In *Giles*, Alabama voting officials denied a large number of blacks the opportunity to register in 1902 because had they been permitted to register, they would have acquired a lifetime registration and thereby would avoid new registration requirements effective in 1903, which included a literacy test.[65] In language similar to some current-day opinions rejecting judicial relief because the issue supposedly involves a "political question," the Court said:

> The bill imports that the great mass of the white population intends to keep the blacks from voting. . . . If the conspiracy and the intent exist, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the voting in that state by officers of the court it seems to us that all that the plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong, if done, as alleged by the people of a state and the state itself, must be given by them or by the legislative and political department of the government of the United States.[66]

E. The General Dismemberment of the Civil War Amendments by the Supreme Court

While violence and wheeling and dealing between the national political parties were combining to dismantle the legacy of the Civil War, the Supreme Court of the United States fully cooperated with that trend. The decisions in *Williams* and *Giles*

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tion against blacks, though it was obvious that the right to vote was in fact denied to blacks as a class, regardless of the particular characteristics of individuals.

[63] 189 U.S. 475 (1903).

[64] *Id.* at 486-88.

[65] *Id.* at 482.

[66] *Id.* at 488. The following year, in Giles v. Teasley, 193 U.S. 146 (1904), the Supreme Court rejected the effort to employ two other remedies, mandamus and an action for damages, in an effort to permit blacks to register.

followed what appears to have been an almost consistent series of decisions in which the post-Reconstruction Court steadily cut down the hopes of equality for black people, culminating in *Plessy v. Ferguson*[67] which legitimated a segregated society.

Most noteworthy of the decisions effectively gutting the Civil War amendments insofar as they concerned black people's civil and political rights were: The *Slaughterhouse*[68] case, which narrowly interpreted the privileges and immunities clause of the fourteenth amendment;[69] *United States v. Cruikshank*,[70] invalidating convictions of whites in Louisiana arising out of the Colfax Massacre, described as "the bloodiest single act of carnage in all of Reconstruction."[71] The convictions were thrown out because there were no specific allegations in the indictment that the defendants were seeking to prevent the exercise of a federal right, *i.e.*, to be free of discrimination in voting in a federal election.[72] Likewise, *United States v. Reese*,[73] decided on the same day as *Cruikshank*, struck down sections of the Civil Rights Act of 1870 which criminalized interference with the right to vote by local election officials who refused to count the votes by reason of racial discrimination.[74] The basis for the *Reese* decision was that the 1870 law could be read as going beyond such discrimination, and the Court refused to save the law by imposing a limiting construction.[75] Finally, there were the *Civil Rights Cases*,[76] which declared unconstitutional much of the Civil Rights Act of

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[67] 163 U.S. 537 (1896).

[68] 83 U.S. (16 Wall.) 36 (1872).

[69] *Id.* at 74. The Court read the fourteenth amendment protection of privileges and immunities as relating only to the rights of national citizenship, which were defined as being extremely limited. The normal rights of citizens to be dealt with equally and to be free of violence were not viewed as part of national citizenship and therefore unprotected by the privileges and immunities clause.

[70] 92 U.S. 542 (1875).

[71] E. FONER, *supra* note 8, at 530. Foner adds, "the decision rendered national prosecution of crimes committed against blacks virtually impossible, and gave a green light to acts of terror where local officials either could not or would not enforce the law." *Id.* at 531.

[72] *Cruikshank*, 92 U.S. at 557-59.

[73] 92 U.S. 214 (1875).

[74] *Id.* at 217-18.

[75] *Id.* at 221.

[76] 109 U.S. 3 (1883).

1875 prohibiting racial discrimination in places of public accommodations.[77] Occasionally, during the early period there was a bright spot such as *Strauder v. West Virginia*,[78] declaring unconstitutional a state statute excluding blacks as such from serving on juries.[79] On the same day, however, in *Virginia v. Rives*,[80] the Court held that mere exclusion of blacks from juries did not imply racial discrimination where there was no state law prohibiting blacks as such from serving.[81]

This was the principle underlying the decisions of the Court in *Williams*, *Gibson*, and *Smith*, all of which held that a black man convicted of murder had no right to complain about total exclusion of blacks from the jury system because the Mississippi constitution and laws did not on their face provide for discrimination.[82] It was the same principle upon which the drafters of the Mississippi Constitution of 1890 and the constitutions of other states which followed it felt that they could adopt plans which, without any concealment, were designed to disfranchise black persons as long as they did not specifically say so in the constitutional document.[83]

Despite this headlong flight of the executive and judiciary branches away from the principles of the Civil War Amendments, one bright area of government — Congress — seemed to be struggling to protect the suffrage rights of blacks at least for about twenty years after the debacle of 1877. Within the House of Representatives there were a series of rulings on contested elections in which forceful voices spoke out against denial to blacks of the right to vote. The remedy they provided was denial of a seat in the House of Representatives. However, even that line of rulings, which was the main legal foundation for the Mississippi challenge of 1965, started crumbling in the mid-1890's and ended in 1904 with the *Dantzler* case out of South Carolina.[84]

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[77] *Id.* at 24-25. The Court came to this conclusion by limiting the fourteenth amendment to state actions. Justice Harlan's dissent showed that the laws could have been sustained as an exercise of congressional power under the thirteenth amendment to eliminate badges of slavery. Eighty years later the Court sustained the Civil Rights Act of 1964 prohibiting discrimination in places of public accommodation by relying on the commerce clause. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

[78] 100 U.S. 303 (1879).

[79] *Id.* at 310.

[80] 100 U.S. 313 (1879).

[81] *Id.* at 322-23. *See generally* Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952) (analyzing judicial coup against Civil War Amendments and supportive legislation); H. MEYER, THE AMENDMENT THAT REFUSED TO DIE (1978). Professor Foner emphasizes that the decisions of the Supreme Court in the 1870's were "a crucial development in view of the fact that Congress had placed so much of the burden for enforcing blacks' civil and political rights on the federal judiciary." E. FONER, *supra* note 8, at 529.

[82] *See supra* notes 58-62 and accompanying text.

[83] J.H. FRANKLIN, *supra* note 8, at 236-37.

Thus, as a practical matter, the twentieth century started with the thirteenth, fourteenth and fifteenth amendments having in large measure been gutted as far as the voting rights of black people were concerned. Though the formal status of slavery had been abolished, blacks, effectively disfranchised and having little or no realistic way of participating in the political process, lived in large areas of the United States in a Jim Crow segregated society, frequently under extreme poverty. The status of blacks in those areas had many elements of what we now refer to as apartheid. Politically, the North simply viewed the South as the "Solid Democratic South," without paying much heed to the fact that at the root of that solidity was the disfranchisement of the black citizens. Many factors explain the North's abandonment of the South: the death of the powerful abolitionists Sumner, Stevens, and others; the development of industry and the Republican Party's becoming the party of business; the foundering of efforts at developing unity with poor whites in the Populist movement; the impact of the serious depression of the 1870's; and many other considerations, not the least of which was racism.[85] The consequences of the abandonment of the Southern blacks by the North were exacerbated by the failure to have provided an economic base from which the freed slaves could develop true independence.[86]

Decisions of the Supreme Court of the United States up to World War II and somewhat beyond did little to change this situation.[87] Thus, with particular reference to the participation of blacks in the political process, the Court sustained a series of well-tried techniques for the exclusion of blacks from voting, *e.g.*, the poll tax for state elections, *Breedlove v. Suttles*;[88] a literacy test as a voting qualification, *Lassiter v. Northampton County Board of Elections*;[89] and the exclusion of blacks from voting in Democratic Party primary elections, *Grovey v. Townsend.*[90]

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[84] *See infra* notes 202-05 and accompanying text.

[85] *See generally* R. LOGAN, THE BETRAYAL OF THE NEGRO: FROM RUTHERFORD B. HAYES TO WOODROW WILSON (1965); K. STAMPP, *supra* note 8, at 187-215; E. FONER, *supra* note 8, at 602-05.

[86] E. FONER, *supra* note 8, at 563.

Thus the voting rights of blacks in the southern states were substantially obstructed by violence and state legislative and judicial action beginning with the mid-1870's and almost entirely suppressed beginning with the 1890's. Neither the executive nor the judicial branches of the federal government responded to the suppression, and the legislative branch after a while capitulated to a similar passivity toward the disfranchisement of blacks.

II. WORLD WAR II AND THE BEGINNINGS OF A TURNAROUND IN THE LEGAL POSITION OF BLACKS; THE CIVIL RIGHTS MOVEMENT OF THE 1960'S AND THE EMERGENCE OF THE MISSISSIPPI FREEDOM DEMOCRATIC PARTY

The tide began to turn in World War II when the United States found itself a world power in a major struggle against fascism, which included a virulent manifestation of racism. Moreover, the world-wide abandonment of colonialism made it impossible for the United States to exercise world leadership while blacks in some sections of the country were denied elementary political rights. Concurrent with these global developments were the increasing stirrings of blacks within the nation.

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[87] A robust scholarly debate has developed as between some who believe that during the so-called "progressive era," generally 1900-1920, the Supreme Court made contributions towards racial justice and "breathed life into Reconstruction Principles that had been left for dead . . . for three decades" (Schmidt, the Judiciary and Responsible Government: 1910-1921 [9 Oliver Wendell Holmes Devise, History of the Supreme Court of the United States (1954), at 722]) and those who perceive no significant change in the Court's fairly consistent upholding of laws and practices under which blacks were reduced to second class citizenship until the second reconstruction, generally understood to have commenced about the middle of this century. *See* Kennedy, *Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt*, 86 COLUM. L. REV. 1622 (1986).

[88] 302 U.S. 277 (1937), *overruled* by Harper v. Virginia Board of Elections, 383 U.S. 663 (1966). The poll tax was invalidated for federal elections in 1964 by the twenty-fourth amendment to the Constitution. U.S. CONST. amend. XXIV, § 1.

[89] 360 U.S. 45 (1959), *overruled* by Louisiana v. United States, 380 U.S. 145 (1965).

[90] 295 U.S. 45 (1935); *overruled* by Smith v. Allwright, 321 U.S. 649 (1944).

Reacting to the increasing role of blacks in war production and in the armed forces, President Roosevelt in 1941 signed an order establishing the Fair Employment Practices Commission with authority to deal with racial discrimination in employment in war industry.[91] In 1948, President Truman signed an order prohibiting segregation in the armed forces[92] and a year after the war established a "Committee on Civil Rights" with a charge (a) to study "whether and in what respect current law-enforcement measures and the authority and means possessed by federal, state and local governments may be strengthened and improved," and (b) to report "recommendations with respect to the adoption or establishment, by legislation or otherwise, of more adequate and effective means and procedures for the protection of the civil rights of the people of the United States."[93]

Brown v. Board of Education[94] was a turning point of unimagined dimensions. Though in terms limited to prohibiting segregation in public education, it effectively overruled *Plessy v.*

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[91] Exec. Order No. 8802, 3 C.F.R. 957 (1938-1943). President Roosevelt signed the order to head off a march on Washington which had been threatened to protest discrimination by war contractors. H. GARFINKEL, WHEN NEGROES MARCH: THE MARCH ON WASHINGTON MOVEMENT IN THE ORGANIZATIONAL POLICIES FOR F.E.P.C. (1959); Jones, *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal and Political Realities*, 70 IOWA L. REV. 901, 906 (1985). Though the New Deal administration was not noteworthy in the field of civil rights, Professor Jones notes that even before the war much New Deal legislation providing for employment and training contained provisions prohibiting discrimination on account of race, color or creed. 70 IOWA L. REV. at 905.

[92] R. DALFIUME, DESEGREGATION OF THE U.S. ARMED FORCES: FIGHTING ON TWO FRONTS, 1939-1953 (1969).

[93] Exec. Order No. 9808, 11 Fed. Reg. 14,153 (1946). The report of the President's Committee on Civil Rights, *To Secure These Rights*, was issued in 1947. Some of the ideas expressed included "the elimination of segregation, based on race, color, creed, or national origin from American life; . . . the conditioning by Congress of all federal grants-in-aid and other forms of federal assistance to public or private agencies for any purpose on the absence of discrimination or segregation based on race, color, creed, or national origin; the enactment of a federal Fair Employment Practices Act prohibiting all forms of discrimination in private employment, based on race, color, creed or national origin." *Id.* The report did, in fact, provide a blueprint for much federal legislation in the ensuing decades.

[94] 347 U.S. 483 (1954).

Ferguson and sparked a radical change in the way race relations came to be viewed in the United States.[95] *Brown* was greeted by determined resistance from a wide range of white leadership throughout the South. One hundred and one southern senators and members of Congress signed the "Southern Manifesto" which attacked the *Brown* decision as the substitution of "naked power" for "established law."[96] Included among the signers was the entire congressional delegation from Mississippi.[97] Throughout the South, Klan or Klan-type groups and various Citizens' Councils grew as whites in the South organized to resist implementation of the Supreme Court decision.[98]

The fruits of *Brown* were soon apparent in confrontations of major national importance where blacks were demanding their full share of equality. In 1956 in Montgomery, Alabama, the gifted and eloquent Martin Luther King, Jr., then twenty-six years old, successfully led a year-long boycott against segregated buses.[99] The following year witnessed the deployment of federal troops by President Eisenhower to quell resistance to a court order directing enrollment of black students at Central High School in Little Rock, Arkansas. Though the President was plainly reluctant to resort to federal military power, his action, as in the post-Civil War period, signalled that federal intervention would inevitably play a significant role in response to the emerging Civil Rights Movement.[100] In connection with the Little Rock confrontation, the Supreme Court in *Cooper v. Aaron*[101] rejected the argument that widespread resistance, including resistance by the governor of the state, justified denial of constitutional rights to minorities.[102]

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[95] The exciting story of the evolution of *Brown* and the steady contributions of some of the great legal minds of the United States, such as Charles Houston, William Hastie, Thurgood Marshall, and Nathan Margold has been eloquently recounted in R. KLUGER, SIMPLE JUSTICE (1975).

[96] 102 CONG. REC. 4460, 4515 (1956).

[97] *Id.*

[98] S. CAGIN & K. DRAY, WE ARE NOT AFRAID 54 (1988).

[99] M.L. KING, JR., STRIDE TOWARD FREEDOM: THE MONTGOMERY STORY (1958). Two recent major biographies of Dr. King detail the extraordinary impact he had on the development of the civil rights movement in the United States in the brief period of twelve years, beginning with his Montgomery activities and ending with his assassination in 1968. D. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR. AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE (1986); T. BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-1963 (1988).

[100] H. ASHMORE, HEARTS AND MINDS: THE ANATOMY OF RACISM FROM ROOSEVELT TO REAGAN, 266-67 (1982); I. SPITZBERG, RACIAL POLITICS IN LITTLE ROCK: 1954-1964, 197 (1987).

Not long thereafter, in February of 1960, a series of lunch counter sit-ins by young blacks in Greensboro, North Carolina, who refused to abide by "white only" areas in a downtown Woolworth's, ignited a movement that quickly spread throughout the South and encompassed various public facilities and means of transportation.[103] "Freedom Rides" which criss-crossed the South achieved nationwide attention because of the highly publicized arrests and beatings of riders.[104]

It was during this period that Mississippi state officials sought to prevent the registration of James Meredith at the University of Mississippi after an order of the Supreme Court of the United States on September 10, 1962, directed that he be admitted.[105] The confrontation turned ugly; the National Guard and eventually regular Army forces were called out to deal with Klansmen, die-hard segregationists, and students who supported the governor's showdown with the federal government. Two people were killed in the rioting and hundreds were injured, but Mr. Meredith was enrolled at the University on October 1, 1962.[106]

Soon enough the "movement" began focusing on political participation in addition to desegregation of facilities. Staff members of the Student Non-Violent Coordinating Committee (SNCC) travelled to Mississippi in early 1961 to explore ways of organizing voter registration efforts. Beginning the previous year a number of tax-exempt organizations, with the prodding and assistance of the Kennedy Administration, created the Voter Education Project to assist in the registration of voters in the

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[101] 358 U.S. 1 (1958).

[102] *Id.* at 18-19.

[103] S. CAGIN & K. DRAY, *supra* note 98, at 60-61 (describing rapid spread of student sit-in movement and organization of Student Non-Violent Coordinating Committee (SNCC) in April 1960).

[104] *Id.* at 106 (description of Freedom Rides).

[105] United States v. Barnett, 376 U.S. 681 (1964).

[106] R. BARRETT, INTEGRATION AT OLE MISS 162 (1965).

South.[107] In the summer of 1963, many students, black and white, from throughout the country flocked to the South at SNCC's invitation to assist in this campaign, presaging the great endeavor of the Freedom Summer the next year.[108] This initial voting work of SNCC in Mississippi gave rise to the creation of the Mississippi Freedom Democratic Party (MFDP), which ultimately became the vehicle for the congressional challenge.

In the fall of 1963, the MFDP, claiming that blacks were effectively barred from voting in regular elections, set up the "Freedom Ballot" and ran Aaron Henry, NAACP leader, as its candidate for governor, and Edwin King, a white chaplain at Tougaloo College, for lieutenant governor in an unofficial election in which some 80,000 votes were cast.[109] In 1964, SNCC organized "Freedom Summer" and hundreds of students from the North literally flooded Mississippi with voter rights activity despite the brutal murders of three civil rights workers — Michael Schwerner, Andrew Goodman, and James Chaney — two whites and one black, in July of that year.[110] By August, some 60,000 persons had registered in MFDP's parallel election machinery.[111] A state convention of the MFDP held that month elected a slate of delegates to appear at the Democratic National Convention and claim the right to represent the state Democratic Party.[112]

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[107] *See* T. BRANCH, *supra* note 99, at 479; D. GARROW, *supra* note 99 at 161-62. *See Hearings Held in Jackson, Miss., Feb. 16-20, 1965*, pp. 176 *et seq.* U.S. Commission on Civil Rights (testimony of Wiley Branton, Director, Voter Education Project).

[108] H. ZINN, *supra* note 4, at 62. The Voter Registration Project for Mississippi started first in McComb, then moved to Greenwood. In both cities there were threats of violence and arrests of civil rights workers. In Amite County, near McComb, a black who cooperated with civil rights workers was murdered. *Id. See generally* C. CARSON, IN STRUGGLE - SNCC AND THE BLACK AWAKENING OF THE 1960'S (1981)(description of violence directed at voting rights workers); H. ZINN, *supra* note 4, at 62-64 (same).

[109] H. ZINN, *supra* note 4, at 250-251.

[110] United States v. Price, 383 U.S. 787, 790 (1966). The grim story of these murders is recounted in considerable detail in S. CAGIN & K. DRAY, *supra* note 98.

[111] P. WATTERS, DOWN TO NOW: REFLECTIONS ON THE SOUTHERN CIVIL RIGHTS MOVEMENT 302 (1971). *See generally* D. MCADAM, FREEDOM SUMMER (1988)(recounting events of summer of 1964).

[112] Guyot and Thelwell, *The Politics of Necessity*, *supra* note 5, at 131-32. This article outlined theoretical and strategic foundations for the actions taken by the MFDP as follows:

> What kind of effective political participation, and what kind of organization was possible for a people whom the entire apparatus of government operated

The leap from state to national politics was swift. In August, the MFDP made an appearance at the Democratic Party convention in Atlantic City, claiming that it, rather than the regular Democrats, should be seated as the delegation representing the Democratic Party of Mississippi.[113] To the argument that its candidates had not participated in the electoral process leading to the convention, the Mississippi blacks asserted that they were shut out of the normal electoral process and had no choice but to set up their own electoral machinery.[114]

The claim that the MFDP, in fact, represented the Democratic Party attracted national recognition after a dramatic, televised appearance before the credentials committee of Fannie Lou Hamer, a plantation worker who had chopped cotton since she was eight years of age and was now the charismatic leader of the MFDP.[115] There were a significant number of liberals within the Democratic Party who supported the MFDP. Though President Johnson had written off Mississippi to the Republicans since most of the leadership of his own party in that state had

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> to exclude and disperse? The concept of parallel elections or "freedom ballot" provided a partial solution . . . . The strategic advantages of this device were many . . . . The entire community could be involved in these campaigns and a people who had been without political exposure for three generations could in this manner be introduced to the mechanics, at least, of political action. At the time that these campaigns created a tradition of political involvement in which indigenous leadership could develop, the vote itself would be an effective refutation of the curious southern contention that people who were daily risking their lives and livelihoods to attempt to register were really not interested in voting. But most important the "Freedom Vote" was a means of taking politics to the people, *where they were*. For example, when in 1963 Dr. Aaron Henry and Rev. Ed King ran as Freedom candidates in the gubernatorial elections, the people in churches, led by the choir, lined up and marched singing past the ballot boxes to cast their votes.
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> . . . The most significant practical consequence of the King-Henry campaign was the state-wide nature of the campaign. It took the movement, for the first time, beyond activities affecting a single town, county, municipality or electoral district, and placed us in the area of state-wide organization . . . . In the Summer of 1964 the state-wide organization was formalized by a series of precinct, county, district meetings, culminating in a state convention of the Mississippi Freedom Democratic Party. (emphasis in original).

Id. at 131-32.

[113] P. WATTERS, *supra* note 111, at 318.

[114] *Id.*

[115] *Id.* at 319.

announced they would support his opponent, he was nevertheless concerned that were he to support the MFDP's claim, he might thereby cause a walkout of the other southern delegations.[116] After much haggling,[117] Johnson and his aides offered the MFDP two at-large seats (to be filled by persons designated by Johnson) while the seated Mississippi Democratic Party delegation would retain their credentials.[118] This was rejected despite strong pleas by liberal supporters of the MFDP whom the Johnson Administration had corralled in an effort to persuade the Freedom Party to accept the proposed compromise.[119] This unusual manifestation of independence of the MFDP from the so-called "liberal establishment" set the stage for the next action.

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[116] *Id.* at 320-21.

[117] *See infra* note 119.

[118] One other feature of the offer which in time proved of great significance was that the national Democratic Party would promise to eliminate all racial discrimination in state party delegate selection procedure in advance of the 1968 convention. "The 1964 convention mandate [called] for fairer representation of Negroes in subsequent delegations . . . ." H. WALTON, JR., BLACK POLITICAL PARTIES 128-129 (1972). In 1968 the Loyal Democrats of Mississippi, a bi-racial coalition made up of the MFDP, the Mississippi AFL-CIO, the NAACP, the Young Democrats, and other liberal groups in the state, challenged the seating of the Mississippi delegation to the national convention. The credentials committee voted to recommend seating the Loyal Democrats. *Id.* The committee based its decision on the guidelines established by the Democratic Party in response to the MFDP's 1964 convention challenge. The committee's recommendation was supported by all three major contenders for the presidential nomination, thus receiving overwhelming support in the full convention. The Loyal Democrat delegation was seated. *Id.*

[119] For a full discussion on the maneuvering at the convention in relation to the MFDP, see S. CAGIN & K. DRAY, *supra* note 98, at 403-422. Though at the time President Johnson had important liberal support and some significant liberal credentials (the Civil Rights Act of 1964 had been enacted earlier that year), the MFDP was not enamored with him, basically because the administration, despite pleas of the civil rights movement, had failed to protect civil rights workers and persons trying to register to vote though the Civil Rights Acts of 1957 and 1960 gave them authority to act. *Id.* at 137, 143. The murder of three young men had intensified that feeling, and the convention was meeting only three weeks after their bodies had been found. In a chapter entitled, "I want to know: which side is the Federal Government on?", the author details the basis for the alienation of the civil rights workers from Washington. H. ZINN, *supra* note 4, at 190-211. Essentially the Justice Department and the FBI did little or nothing to enforce against southern officials the various laws providing criminal penalties for interfering with civil rights. Indeed, the Justice Department insisted that "the responsibility for preservation of law and order, and the protection of citizens against unlawful conduct on the part of others, is the responsibility of local authorities." *Id.* at 197. Allen Dulles, formerly director of the CIA, was sent by President Johnson as his "personal investigator" to look into the matter of the three missing civil rights workers, before their bodies were found. Incredibly, after one day in Mississippi, he recommended that civil rights workers should "stay out of danger areas" and "keep local authorities advised of their

The delegates of the MFDP returned to Mississippi and shortly thereafter took steps toward a formal challenge in Congress to the seating of the five Congressmen elected from Mississippi.[120] In this manner they escalated the political stakes and called upon Congress to put an end to the persistent denial of votes to the black people of Mississippi.[121]

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whereabouts and location of their activities." A. KINOY, *supra* note 6, at 249. *See also* B. MARSHALL, FEDERALISM AND CIVIL RIGHTS (1964).

But the civil rights workers believed that these local authorities were in fact responsible for much of the difficulties. Sheriff Rainey and Deputy Sheriff Price of Neshoba County were both indicted for participation in a conspiracy to violate the constitutional rights of the three civil rights workers. Price was convicted. Rainey was acquitted by the jury. United States v. Price, 383 U.S. 787, 790 (1966).

Ultimately two lawsuits reflected the conviction of the civil rights movement in the deep South that local sheriffs were a large part of the problem. In Moses v. Kennedy, 219 F. Supp. 762 (D.D.C. 1963), *aff'd sub nom.* Moses v. Katzenbach, 342 F.2d 931 (D.C. Cir. 1965), the civil rights workers unsuccessfully sought to compel the Department of Justice to prosecute those who were responsible for interfering with civil rights. *Moses*, 342 F.2d at 931. The suit foundered on the familiar principle of prosecutorial discretion. *Id.* In COFO v. Rainey, 339 F.2d 898 (5th Cir. 1964), the civil rights movement sued Rainey and Price, sheriff and deputy sheriff of Neshoba County where the three civil rights workers were murdered, as representative of the class of all sheriffs of Mississippi, as well as the State Highway Patrol, the Ku Klux Klan, and the Association of Citizens' Councils of Mississippi. The plaintiff sought to have the courts appoint commissioners under 42 U.S.C. § 1989, with power to order the arrest and prosecution of persons violating any of thee laws protecting civil rights. *Id.* at 899. The suit was withdrawn after the federal government procured indictments in the Neshoba county case.

[120] Minnis, *supra* note 5, at 272. This had been an integral part of the political program of the MFDP from the beginning and had been planned long before the Atlantic City convention. The freedom elections for Congress held on October thirtieth through November second were the first step. *Id.*

[121] Some Democratic Party leaders had urged a different course, namely, a suit in the U.S. District Court seeking to enjoin the certification of the congressional delegation on the grounds that the election reflected a violation of the fifteenth amendment. Rovere, *Letter from Washington: Mississippi Challenge*, NEW YORKER, Oct. 17, 1965, at 236. The congressional challenge was probably on a sounder legal footing in the light of Art. I, § 5 of the Constitution delegating to Congress the power to judge elections. Besides, taking the case to the federal courts would immediately put the issue in the hands of judges who had shown their hostility to voting claims by blacks. While an appeal was possible, the favorable momentum developed at Atlantic City would be dissipated.

III. THE CONGRESSIONAL CHALLENGE OF 1965

A. *The Factual Foundation for the Challenge as of the 1960's; The Success of the Mississippi Plan in Excluding Blacks From the Voting Process*

Beginning in 1960, the Commission on Civil Rights, an independent bipartisan agency established by Congress in 1957, undertook a study of registration and voting by Mississippi's black citizens.[122] The reason for a special interest in Mississippi was that its black citizens recorded the lowest percentage of registration of all the southern states.[123]

The 1965 Report of the Commission details not only the history of the disfranchisement movement up to the 1890 constitution, as outlined above, but also more recent persistent efforts of Mississippi's political leadership to maintain the status quo.[124]

Thus, in 1957, Congress authorized the Attorney General to bring suit to prevent denial of the right to vote based on race, color or national origin.[125] This authority was strengthened by the Civil Rights Act of 1960, which required the maintenance and production of registration and voting records and authorized the appointment of voting referees where a pattern or practice

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[122] CIVIL RIGHTS 1960-63, 22 (L. Sobel ed. 1964).

[123]

Estimated Black Voter Registration Percentages In Southern States in 1956 and 1964

	1956	1964
Alabama	11	23
Arkansas	36	49.3
Florida	32	63.7
Georgia	27	44
Louisiana	31	32
Mississippi	5	6.7
North Carolina	24	46.8
South Carolina	27	38.8
Tennessee	29	69.4
Texas	37	57.7
Virginia	19	45.7

[124] *Id.* at 8-15.

[125] 42 U.S.C. § 1971(c) (1957).

of discrimination was found.[126] Armed with these new laws, the Department of Justice in 1960 undertook an extensive litigation program in Mississippi.

The response of the Mississippi legislature was to enact a law specifically authorizing the destruction of registration records[127] and a constitutional amendment, ratified in 1960, which added "good moral character" as a qualification for voting.[128]

The first success of the Justice Department's litigation program was the decision of the Court of Appeals for the Fifth Circuit in *United States v. Lynd*[129] which ordered the registrar of Forrest County in very specific respects to alter his discriminatory practices regarding the registration of whites and blacks.[130] The immediate response of the legislature was the enactment of a series of laws to further restrict voting by blacks.[131]

Despite these obstacles, the Department of Justice undertook and carried through a steady course of litigation.[132] Twenty-six cases were filed under 42 U.S.C. § 1971 (a) which in general terms prohibits discrimination based on race in permitting persons to vote.[133] These cases attacked improper administration of state laws by state officials.[134] Seven cases were filed under 42 U.S.C. § 1971 (b), prohibiting intimidation or reprisal for exercising the right to vote.[135] As described by the Commission, the incredible delays in this litigation program were in considerable part occasioned by a number of judges in the United States district courts who steadfastly obstructed the Department's litigation program.[136]

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[126] 42 U.S.C. § 1971(e)(1960).

[127] Act of May 26, 1962, ch. 569, § 1, para. 2, 1962 Miss. Laws 1008, 1009.

[128] MISS. CONST. art. XII, § 241A.

[129] 301 F.2d 818 (5th Cir. 1962).

[130] *Id.* at 823.

[131] The opinion of the Court of Appeals is a primer on how litigation as to voting rights was obstructed by local officials and district court judges. The response of the legislature showed the willingness of state legislative bodies to join the obstructive process. One week after the Court of Appeals acted, the following bills were introduced in the Mississippi legislature:

> (1) implementing the good moral character requirement already adopted in § 241-A of the constitution; (2) strengthening an existing requirement that applicants execute a letter-perfect form wholly without assistance; (3) establishing the requirement that the names of applicants for registration be published in a local newspaper once a week for two weeks as an invitation to voters to challenge the qualification of applicants; and (4) directing the registrar not to advise rejected applicants of the reason for their rejection (except as to those rejected on account of bad moral character), since that would constitute illegal help. These bills were all enacted into law in May 1962.

MISS. CODE ANN. §§ 3312.5, 3212.7, 3213, 3217-01 to -15 (Supp. 1962).

[132] VOTING IN MISSISSIPPI, *supra* note 47, at 52-65. Most of the voter litigation in Mississippi during this period was undertaken by the Department of Justice. *Id.* An exception was Hamer v. Campbell, 358 F.2d 215, 224 (5th Cir. 1966). *See infra* note 317 and accompanying text.

Though the Department was ultimately successful in almost all of its cases, frequently appellate relief was required.[137] The litigation initially did not attack the constitutionality of the underlying state legislation but merely its implementation at the local level.[138] Finally, in August 1962, the Department brought a statewide action to declare unconstitutional a series of Mississippi laws affecting voting rights and procedures.[139] The case was never determined by the Supreme Court on the merits, because it was dismissed below and had to be remanded to the district court for trial and determination.[140] The opinion of the

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[133] VOTING IN MISSISSIPPI, *supra* note 47, at 52.

[134] *Id.*

[135] *Id.* at 55.

[136] *See* J. BASS, UNLIKELY HEROES 165-68 (1981); D. GARROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR. AND THE VOTING RIGHTS ACT OF 1965, 22-24 (1978); Comment, *Judicial Performance in the Fifth Circuit*, 73 YALE L.J. 90 (1963)(delay of civil rights cases in Fifth Circuit courts).

[137] D. GARROW, *supra* note 136, at 23.

[138] *Id.* at 18.

[139] United States v. Mississippi, 229 F. Supp. 925 (S.D. Miss. 1964). In a 2-1 decision, a three-judge court dismissed the complaint on a variety of procedural holdings, including that the United States had no right to sue the state, that the state election commissioners were improper parties, and that venue was improper as to the county registrars. *Id.* Despite its ruling to dismiss on these considerations,the majority of the district court then proceeded to a long discussion sustaining the constitutionality of the entire voting system of Mississippi. *Id.* at 949.

[140] United States v. Mississippi, 380 U.S. 128, 144 (1965). The trial in fact never occurred though the case had a continued life. *See* United States v. Mississippi, 256 F. Supp. 344 (S.D. Miss. 1966). Following enactment of the Voting Rights Act of 1965 and the changes in Mississippi constitutional and legislative provisions relating to voting qualifications, four state court injunctions were obtained by Mississippi's attorney general to bar the use of certificates of eligibility to vote which were issued by federal examiners. United States v. Mississippi, 256 F. Supp. at 346-47. These injunctions were swept aside, as were the revised provisions of the Mississippi laws which required an ability to read and write. It is noteworthy that less than one year after the enactment of the Vot-

Supreme Court includes a detailed discussion of various devices that were continually added to the law for the purpose of making the registration process more difficult for blacks.[141] On the same day, however, the Court in *Louisiana v. United States*[142] did declare unconstitutional a package of laws similar to those adopted in Mississippi.[143]

In the course of the litigation program of the Justice Department, a number of Fifth Circuit opinions emerged which are remarkable for the detail with which they describe the discrimination, harassment and violence experienced by blacks who sought to register in Mississippi. Thus, in *United States v. Edwards*[144] a sheriff of Rankin County beat a black person who was trying to register.[145] In the sheriff's own words, "I struck just as many times and fast as I could."[146] In *United States v. Duke*,[147] dealing with Panola County, the court summarized the undisputed evidence showing that whites were registered speedily and routinely, whereas blacks were given difficult tests of interpreting the constitution and were made to wait long hours.[148] In *United States v. Lynd*,[149] concerning Forrest County, it appeared that no white applicants had ever been rejected for registration while no blacks were registered although forty of them had sought to do so.[150] In *United States v. Dogan*,[151] dealing with Tallahatchie County, blacks were denied the opportunity to pay their poll taxes however much they tried.[152]

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ing Rights Act the district court felt sufficiently reassured by state officials' promise to comply with the court's opinion that it found it unnecessary to issue an injunction. A declaratory judgment was deemed sufficient. United States v. Mississippi, 256 F. Supp. at 348.

[141] United States v. Mississippi, 380 U.S. at 131-36.

[142] 380 U.S. 145 (1965).

[143] *Id.* at 256.

[144] 333 F.2d 575 (5th Cir. 1964).

[145] *Id.* at 580 (Brown, J., dissenting).

[146] *Id.*

[147] 332 F.2d 759 (5th Cir. 1964).

[148] *Id.* at 764.

[149] 301 F.2d 818 (5th Cir. 1962).

[150] *Id.* at 821.

[151] 314 F.2d 767 (5th Cir. 1963).

[152] *Id.* at 768. *See also* United States v. Ramsey, 331 F.2d 824 (5th Cir. 1964)(denial of opportunity to register for blacks).

One of the most comprehensive and authoritative judicial opinions tracing the his-

In 1965, the Civil Rights Commission concluded its extensive study with the following findings:

Findings

1. The State of Mississippi, for the purpose of preventing registration by Negroes, had enacted over the past 75 years a series of laws establishing a constitutional interpretation test, and other tests for registrars to administer these requirements. The stringency of these tests was increased at a time when most whites were already registered and few Negroes were registered.

2. Registration records indicate that county registrars in a large number of Mississippi counties have discriminated against Negroes in the administration of these tests primarily by (a) giving Negroes more difficult constitutional sections to interpret than whites; (b) disqualifying Negroes for insufficiencies in the completion of the application form or in the interpretation of the selected constitutional section when comparable or greater insufficiencies failed to disqualify white applicants; and (c) affording assistance to white applicants but not to Negroes.

3. The Mississippi poll tax was established and made a qualification for voting for the purpose of preventing the exercise of the franchise by Negroes. In some counties local officials have refused to accept payment of the poll tax from Negroes or have encouraged white electors to pay such tax and have failed to encourage, or have discouraged, Negroes from doing so. The poll tax was adopted on the belief that Negroes as a class would find it more difficult to pay than whites as a class. In 1890, when the poll tax was adopted, this belief was justified and it remains so today. In light of actual economic conditions, the payment of a poll tax is a significantly heavier burden for most Negroes than it is for most whites.

4. Negro applicants for registration, Negroes seeking to vote, and civil rights workers have been harassed and intimidated by local officials in connection with registration and voting activi-

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tory of the various efforts to disfranchise blacks in Mississippi, and their effectiveness, is the dissenting opinion of Judge Brown in United States v. Mississippi, 229 F. Supp. 925, 974-998 (S.D. Miss. 1964). The two judges who made up the majority, Circuit Judge Cameron and District Court Judge Cox, were generally considered among the most intransigent federal judges in resisting the burgeoning civil rights claims of blacks. *See* J. Bass, *supra* note 136, at 165-68.

ties. On occasion such persons have suffered violence from private persons.

5. Negro applicants for registration, Negroes seeking to vote, and civil rights workers have, on occasion, suffered acts of economic intimidation and reprisal in connection with registration and voting, both from public officials and from private persons.

6. There is widespread fear in many Negro communities that an attempt to register or vote would result in economic or physical reprisals. Such fears have been increased by the provisions of Mississippi law which require newspaper publication of the name and address of any applicant, and by the practice of requiring the applicant to return to the office of the registrar to determine whether he has passed the test. Fear of reprisal is a major factor inhibiting attempts by Negroes to registrar or vote. In counties where fear is great, Negroes will not attempt to register in significant numbers without assistance or encouragement.

7. Most Negro Mississippians now of voting age have been educated in segregated public schools which were and still are inadequate and greatly inferior to public schools provided for white children. Public education of Negroes has been so poor and so inferior to the education afforded whites that any test of skills taught in the public schools is inherently unfair as a prerequisite to voting.[153]

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[153] VOTING IN MISSISSIPPI, *supra* note 47, at 60-61. A frequently expressed view of white political leadership of the South was that the four million freed slaves were simply incapable of participation in the political process because overwhelming numbers of them were illiterate. DuBois estimated the figure to be "well over 95% in 1863." W.E.B. DUBOIS, *supra* note 24, at 638. Of course it was the same leadership that had criminalized education during the ante-bellum period. The contention that education must precede political participation was undercut by the fact that after Reconstruction and the substantial elimination of blacks from the political process, the education afforded the blacks by the South was woefully inadequate.

The facts detailed by the Civil Rights Commission on this score showed, for example, that, during the 1930's when most Mississippi blacks of voting age at the time the report was written were educated, the following conditions prevailed:

> Mississippi spent between six and seven dollars per year in educating each Negro child; more than five times as much was spent in educating each white child. Although in 1930 there were more Negro than white children of school age, the State provided only 46 public high schools for Negroes out of a State total of nearly 700. White high school enrollment was about 50,000 and Negro enrollment about 5,000. In 1931 many Negro elementary and secondary schools

8. Existing Federal remedies have not proved adequate to eliminate discrimination and to prevent reprisals for voting. Law suits against registrars have proved too slow and too cumbersome a device to remedy discrimination. Recent judicial approaches promise more speedy relief but are still inadequate in that the registration machinery will remain in the hands of state officials who have demonstrated an unwillingness to enforce Federal law. Law suits aimed at acts of reprisal have been filed in only a few cases and do not appear to have provided an effective remedy.

9. As a result of the foregoing, it is estimated that in Mississippi less than 7 percent of the Negro voting age population but more than 70 percent of the white voting age population are registered to vote. Mississippi had by far the lowest rate of Negro registration of any State in the South and has shown virtually no increase in such registration as the result of the enactment of Federal legislation designed to eliminate discrimination in voting.[154]

B. The Legal Foundation for the 1965 Congressional Challenge

The U.S. Constitution provides: "Each House shall be the Judge of Elections, Returns and Qualifications of its own Members."[155]

During the Reconstruction period and for some time thereafter, Congress recognized its responsibility to set aside elections which failed to represent a fair and free expression by the voters of the affected congressional district. Indeed, during that period the House set aside election results in numerous cases where black exclusion from the voting process by fraud, violence or intimidation was established.[156]

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had only a single teacher. White one-teacher schools were being rapidly eliminated as a result of a program of consolidation begun twenty years before. VOTING IN MISSISSIPPI, *supra* note 47, at 43.

[154] VOTING IN MISSISSIPPI, *supra* note 47, at 61.

[155] U.S. CONST. art I, § 5, cl. 1.

[156] *See e.g.* Hunt v. Menard, 1 HINDS § 327 p. 208, 2 Bart 471, Rowell's Digest p. 226, 40th Cong. 3rd Sess. (La. 1869); Darrall v. Bailey, 1 HINDS § 336 p. 226, 2 Bart. 754 Rowell's Digest 246, 41st Cong. 2nd Sess. (La. 1870); Hoge v. Reed, 1 HINDS § 620 p. 804,

As stated earlier, one of the most important precedents in this field for Mississippi was *Lynch v. Chalmers* in the 47th Congress.[157] In the election of 1880, John R. Lynch, a black citizen of Mississippi, sought to run for Congress as a Republican

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2 Bart. 540, Rowell's Digest 233, 41st Cong. 1st Sess. (S.C. 1869); Hunt v. Sheldon, 1 Hinds § 331 p. 218, 2 Bart. 703, Rowell's Digest 241 41st Cong. 2nd Sess. (La. 1870); Newsham v. Ryan, 1 Hinds § 335 p. 224, 2 Bart. 724, Rowell's Digest 244, 41st Cong. 2d Sess. (La. 1870); Sypher v. St. Martin, 1 Hinds § 333 p. 221, 2 Bart. 669, Rowell's Digest 241, 41st Cong. 1st Sess. (La. 1869); Wallace v. Simpson, 1 Hinds § 621 p. 808, 2 Bart. 552, Rowell's Digest 235, 41st Cong. 2d Sess. (S.C. 1869); Giddings v. Clark, 1 Hinds § 601 p. 783, Smith 91, Rowell's Digest 279, 42nd Cong. 2d Sess. (Tx. 1871); Sheridan v. Pinchback, 1 Hinds § 623 p. 813, Smith 196, Rowell's Digest 293, 43rd Cong. 1st Sess. (La. 1874); Sloan v. Rawls, 2 Hinds § 895 p. 113, Smith 144, Rowell's Digest 288, 43rd Cong. 1st Sess. (Ga. 1874); Buttz v. Mackey, 2 Hinds § 920 p. 163, Smith 683, Rowell's Digest 320, 44th Cong. 1st Sess. (S.C. 1876); Bisbee v. Finley, 2 Hinds § 977 p. 317, 2 Ells. 172, Rowell's Digest 368, 47th Cong. 2nd Sess. (Fla. 1883); Lynch v. Chalmers, 2 Hinds § 959 p. 263, 2 Ells. 338, Rowell's Digest 375, 47th Cong. 1st Sess. (Miss. 1882); Mackey v. O'Conner, 1 Hinds § 735 p. 950, 2 Ells. 561, Rowell's Digest, 387, 47th Cong. 1st Sess. (S.C. 1882); Sessinghaus v. Frost, 2 Hinds § 975 p. 313, 2 Ells. 380, Rowell's Digest 378, 47th Cong. 2nd Sess. (Mo. 1883); Smalls v. Tillman, 2 Hinds § 968 p. 297, 2 Ells. 430, Rowell's Digest 381, 47th Cong. 1st Sess. (S.C. 1882); Smith v. Shelly, 2 Hinds § 965 p. 290, 2 Ells. 18, Rowell's Digest 364, 47th Cong. 1st Sess. (Ala. 1882); Atkinson v. Pendleton, 2 Hinds § 1020 p. 451, Rowell 43, Rowell's Digest 440, 51st Cong. 1st Sess. (W. Va. 1890); Clayton v. Breckinridge, 2 Hinds § 1018 p. 444, Rowell 679, Rowell's Digest 464, 51st Cong. 1st Sess. (Fla. 1890); Langston v. Venable, 2 Hinds § 1032 p. 485, Rowell 435, Rowell's Digest 458, 51st Cong. 1st Sess. (Va. 1890); McDuffie v. Turpin, 2 Hinds § 1030 p. 479, Rowell 255, Rowell's Digest 454, 51st Cong. 1st Sess. (Ala. 1890); Miller v. Elliott, 2 Hinds § 1034 p. 493, Rowell 505, Rowell's Digest 461, 51st Cong. 1st Sess. (S.C. 1890); Mudd v. Compton, 1 Hinds § 577 p. 750, Rowell 147, Rowell's Digest 447, 51st Cong. 1st Sess. (Md. 1890); Waddill v. Wise, 2 Hinds § 1026 p. 469, Rowell 203, Rowell's Digest 452, 51st Cong. 1st Sess. (Va. 1890); Aldrich v. Robbins, 2 Hinds, § 1064 p. 579, Rowell's Digest 502, 54th Cong. 1st Sess. (Ala. 1896); Aldrich v. Underwood, 2 Hinds § 1091 p. 631, Rowell's Digest 509, 54th Cong. 1st Sess. (La. 1896); Goodwyn v. Cobb, 1 Hinds § 720 p. 928, Rowell's Digest 504, 54th Cong. 1st Sess. (Ala. 1896); Hopkins v. Kendall, 2 Hinds § 1095 p. 636, Rowell's Digest 512, 54th Cong. 2d Sess. (Ky. 1897); Johnston v. Stoke, 2 Hinds § 1126 p. 706, Rowell's Digest 530, 54th Cong. 1st Sess. (S.C. 1902); Martin v. Lockhart, 2 Hinds § 1089 p. 626, Rowell's Digest 524, 54th Cong. 1st Sess. (N.C. 1896); Murray v. Elliott, 2 Hinds § 1074 p. 597, Rowell's Digest 543, 54th Cong. 1st Sess. (S.C. 1896); Thorp v. McKinney, 2 Hinds § 1072 p. 594, Rowell's Digest 537, 54th Cong. 2d Sess. (Va. 1896); Aldrich v. Plowman, 2 Hinds § 1097 p. 640, Rowell's Digest 554, 55th Cong. 2d Sess. (Ala. 1898); Thorp v. Epes, 2 Hinds § 1098 p. 643, Rowell's Digest 565, 55th Cong. 2d Sess. (Va. 1898); Wise v. Young, 2 Hinds § 1102 p. 650, Rowell's Digest 569, 55th Cong. 2nd Sess. (Va. 1898); Aldrich v. Robbins, 2 Hinds § 1115 p. 686, Rowell's Digest 597, 56th Cong. 1st Sess (Ala. 1900); Pearson v. Crawford, 2 Hinds § 1112, p. 680, Rowell's Digest 608, 56th Cong. 1st Sess. (N.C. 1900); Wise v. Young, 2 Hinds] 1111 p. 677, Rowell's Digest 611, 56th Cong. 1st Sess. (Va. 1900).

[157] Hinds, § 959 p. 263, Rowell's Digest 375, 47th Cong., 1st Sess. (Miss. 1882).

from the sixth congressional district, a gerrymandered district with a substantial majority of black residents.[158] Utilizing a technical construction of Mississippi voting laws to eliminate large numbers of black voters, the election officials certified Lynch's white opponent, former Confederate General James Ronald Chalmers, a Democrat, as the official winner.[159] Lynch filed a notice of contest, and the challenge was fully litigated before the House.

The threshold question before the House was whether the House was controlled in any way by the decisions of Mississippi election officials and Mississippi courts[160] as to the operation and effect of Mississippi election laws.[161] Both the majority of the House Elections Committee and the House itself rejected this position as "subversive of" the constitutional mandate that the House "shall be the Judge of the Elections, Returns and Qualifications of its own Members."[162] As members of the House

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[158] *Lynch*, 2 Hinds § 959 p. 263.

[159] *Id.*

[160] Oglesby v. Sigman, 58 Miss. 502 (1880). The election officials rejected over 5,000 votes cast for Lynch on the ground that the ballots were illegally marked. *Id.* at 502. Illiterate black supporters of Lynch voted for him, so it was claimed, in violation of Mississippi law. *Id.*

[161] 13 Cong. Rec. 3378-79 (1882). Both the contestee, General Chalmers, and the minority of the House Elections Committee vigorously pressed this contention, arguing that the House was foreclosed by the decisions of Mississippi election officials and Mississippi state courts. *Id.* at 3379.

[162] U.S. Const. art. I, § 5, cl. 1. *See* 13 Cong. Rec. 3379 (1882); 1 Hinds p. 269. The Majority position, that under the mandate of art. I, § 5, cl. 1 of the Constitution, the House would not be bound by state law or state decisions as to the operation or effect of state registration or election laws, had been uniformly adhered to by the House. *See, e.g.* Vallandigham v. Campbell, 1 Hinds § 726 p. 937, 1 Bart. 223, Rowell's Digest 151, 35th Cong., 1st Sess. (Ohio 1898); Hoge v. Reed, 1 Hinds § 620, p. 804, 2 Bart. 540, Rowell's Digest 223, 41st Cong., 1st Sess. (S.C. 1869)(2 cases); Wallace v. Simpson, 1 Hinds § 7620, p. 808, 2 Bart. 552, Rowell's Digest 235, 41st Cong., 1st Sess. (S.C. 1869). "By the Constitution, in all matters pertaining to the election, returns, and qualifications of its Members, the House is made a law unto itself and has no other rule forced upon it for the determination of these questions than the sanction of the oath of its Members . . . ."

1 Hinds at p. 809.

See also 1 Hinds ch. 21, p. 847-73; Patterson v. Carmack, 2 Hinds § 1104, p. 657, Rowell's Digest 574, 55th Cong., 2d Sess. (Tenn. 1898); Spaulding v. Mead, 1 Hinds § 637 p. 848, Rowell's Digest 54, 95th Cong., 1st Sess. (Ga. 1805); Boles v. Edwards, 1 Hinds § 605 p. 789, Rowell's Digest 264, 42d Cong., 2d Sess. (Ar. 1872); Colden v. Sharpe, 1 Hinds § 638 p. 849, Smith 19, Rowell's Digest 265, 17th Cong. 1st Sess. (N.Y. 1821);

saw the issue, the question before the House was whether the white Democrats would be permitted to disfranchise the overwhelming majority of black citizens of that state through the manipulation of Mississippi election laws, and through the use of intimidation and terror.[163] In the words of Congressman Moore of Tennessee, those who sought to sustain the legitimacy of congressional elections from which black citizens were largely excluded, "do not recognize the great American idea of majority rule except when it happens to fit a white constituency."[164]

In an eloquent and stirring speech on the floor of the House, the contestant, Mr. Lynch, sharply placed before the House the impact of black disfranchisement upon the structure of American society:

> You cannot consent to the elimination of the colored man from the body-politic, especially through questionable and fraudulent methods, without consenting to your own downfall and to your own destruction. . .
> The condition of the colored people of this country today is a living contradiction of the prophecies of those who have predicted that the two races could not live upon the same continent together upon terms of political equality. In spite of these predictions we are here today, clothed with the same rights, the same privileges, and the same immunities, with complete political assimilation; loyal to the same Government, true to the same flag; yielding obedience to the same laws, revering the same institutions, actuated by the same patriotic impulses, imbued with the same noble ambition; entertaining the same hopes, seeking the gratification and satisfaction of the same aspirations; identified with the same interests, speaking the same language; professing the same religion, worshipping the same God. The colored man asks you in this particular instance to give effect to his ballot, not for his sake alone, but for yours as well. He asks you to recognize the fact that he has the right to assist you in defending, protecting, and upholding our Govern-

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Barry v. United States ex rel. Cunningham, 279 U.S. 597, 613 (1929)(Senate investigation of validity of election of Pennsylvania Senator and subsequent issuance of warrant to compel testimony of key witness upheld as part of judicial power conferred upon Senate by article 1, § 5, cl. 1 of U.S.

[163] 13 CONG. REC. 3336 (1882).

[164] *Id.*

> ment and perpetuating our institutions. You must, then, as I am sure you will, condemn the crimes against our institutions, against law, against justice, and against public morals that were committed in this case.[165]

Congressman Robeson of New Jersey, presenting the majority report of the House Elections Committee, expressed at the outset the fundamental assumptions upon which the committee concluded that the contestee must be unseated.[166] In asserting the responsibility of the House to reject elections based upon exclusion of blacks from the franchise, Mr. Robeson explained the committee's proposal to unseat the contestee in terms of first principles, "the great ideas which lie at the foundation of the Government."[167] Central to these ideas, the spokesman for the majority told the House, is the proposition that "[f]ree government rests for its foundation on the free expression of the people's will" and that "[e]lections are the accepted and legal method through which that will is expressed and presented."[168] For this reason, the majority spokesman reminded the House, "Unless the election is free it is no election, since it lacks its very essence."[169] Upon this basic assumption, essential to "the idea of representative government,"[170] the committee grounded its conclusions that an election from which black citizens are excluded violates the fifteenth amendment.[171] Such an election is not a "free election" and hence, in Mr. Robeson's words, "it is no election."[172]

The majority of the committee, through Congressman Robeson, went on to assert the broad and sweeping constitutional powers of the House to judge the nature of such elections and to fashion a remedy to guarantee that "the will of the authorized voter is not swallowed up and defeated by the action of illegal usurpers of his power."[173]

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[165] 13 CONG. REC. 3386-87. *See* Gill v. Dyer, 6 Cannon § 138 p. 253, 255, Moore's Digest, p. 84 63rd Cong. 2d Sess. (Mo. 1914)(formal ruling of Speaker Mr. Clark of Missouri, noting that House had uniformly permitted contestant to be heard on floor of House during debate on election challenge).

[166] 13 CONG. REC. at 3427.

[167] *Id.*

[168] *Id.* Mr. Robeson stressed that these issues were legal questions not political questions and depended upon constitutional law not common law. *Id.*

[169] *Id.* The essential principle of a representative government, as declared by Mr. Robeson, was "that if a qualified Representative receives . . . a majority of qualified votes, he is entitled to his seat . . . all else is machinery for the accomplishment of these essential objects." *Id.* at 3428.

[170] *Id.* at 3427.

[171] *Id.* at 3428.

[172] *Id.* at 3427.

In addition to passing a resolution unseating the contestee by a vote of 125 to 71, 95 not voting, the House, on the recommendation of the committee, passed a resolution declaring the contestant, John R. Lynch, elected and entitled to the seat from the sixth district.[174] The resolution seating the contestant rested upon findings by the committee that the ballots actually cast for the contestant and excluded by the election officials were sufficient to establish a majority for him.[175]

Another case which bears mention is the South Carolina election case of *Johnson v. Stokes*.[176] In that case the issue was the massive disfranchisement of black voters as a result of the operation of a state registration law which was claimed to be in violation of the state constitution.[177]

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[173] *Id.*

[174] *Id.* at 3450-51.

[175] *Id.* at 3451. Congressman Lynch had earlier (during period of Reconstruction government) served as the highly respected Speaker of the House in Mississippi. J. GARNER, RECONSTRUCTION IN MISSISSIPPI 296 (1901). He was elected to Congress in the 43rd Congress (1872) when only 26 years of age and again in the 44th Congress. AUTOBIOGRAPHY OF JOHN LYNCH, REMINISCENCES OF AN ACTIVE LIFE, 155, 169 (J. Franklin ed. 1970). He was an active legislator, concerning himself with issues such as civil rights, the Department of Interior, and repeal of an increase in congressional salaries. *Id.* at xvi-xviii. He lost to Chalmers in a bid to be re-elected to the 45th Congress. *Id.* He tried to contest this election, but Chalmers claimed he had not been served with notice and the House Committee on Elections refused to consider the challenge. *Id.* at 182-86. Lynch did not run again until the 47th congressional election and this race produced the contest referred to in the text. After winning the contest, he served a full term in Congress. After the 1880 election, the Democratic Party controlled the Mississippi state legislature and gerrymandered the sixth district. *Id.* at 276. Lynch ran for re-election in 1882 and 1884 but was defeated. *Id.* at 287-88.

In 1884 Lynch was elected as temporary chairman of the Eighth Republican National Convention held in Chicago and was the first black to make a keynote address to a major national political convention. Lynch was an active and important personality in Mississippi Republican politics. He, with two other blacks, James Hill (collector of Internal Revenue in state) and Blanche K. Bruce (former U.S. Senator and thereafter employed by the U.S. Treasury Dept.), dominated the black wing of the Republican Party in Mississippi during the post-Reconstruction period. Halsell, *James R. Chalmers and "Mahoneism" in Mississippi*, J. S. HIST. 37, 48 (Feb.-Nov. 1944).

Lynch held various government appointments, was admitted to the bar of Mississippi in 1896, practiced law for a while in Washington, D.C., and Chicago, and died in 1939 at the age of 92. His autobiography referred to above was dictated to his niece during the 1930's and edited by John Hope Franklin. Some of his additional writings are listed *supra* note 27.

In the committee and before the House itself there was a clear majority view that the registration statutes were unconstitutional and that blacks had been massively disfranchised.[178] The issue that was debated was the question of remedy.[179] A majority of the committee, while acknowledging the invalidity of the laws and the disfranchisement of the blacks, nonetheless recommended that the contestee be seated since it could not be established that the contestant would have received a majority of the votes.[180] The minority argued that there was ample evidence that the excluded voters would have voted Republican.[181] The

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[176] 2 Hinds § 1126, 54th Cong., 1st Sess. (S.C. 1896). H.R. Rep. No. 1279, 54th Cong., 2d Sess. 28 Cong. Rec. 5762, 5700, 5905 (1896).

[177] *Id.* The utilization of registration statues as the vehicle for accomplishing the disfranchisement of voters has come before the House in a number of contested election cases. *See, e.g.*, Miller v. Elliott, 2 Hinds § 1034 p. 493, Rowell's Digest 461, 51st Cong., 1st Sess. (S.C. 1890)(registration law of South Carolina held unconstitutional by House; many black voters disfranchised; contestant seated); Sessinghaus v. Frost, 2 Hinds § 975 p. 313, 2 Ellis. 380, Rowell's Digest 378, 47th Cong., 2d Sess. (Mo. 1883)(registration ordinance of St. Louis held of no effect by House; black voters disfranchised; Congress has power to remedy exclusion by unseating contestee; contestant seated).

[178] 2 Hinds § 1126 p. 708. *See* 28 Cong. Rec. 5759 (1896). Considering particularly what Congress was to decide in 1904, a bare nine years later (*infra* note 206), it is of special interest to note that as of 1896 there was undisputed unanimity on the proposition that the House had the power, for the purpose of making its determination on a contested election case, to rule that a registration statute was unconstitutional. As put by Congressman Jenkins, speaking for the majority "among all of the able Democratic members of the 51st Congress there was not one of them willing to put himself on record as denying the power of Congress to inquire into the constitutionality of the laws of the state affecting the right of a claimant to a seat in Congress." *Id.* at 5759.

[179] *Id.* at 5756-70.

[180] *Id.* at 5871-75, 5905-57.

[181] Rowell's Digest 534. The House has in a number of instances involving exclusion of black voters from the elective process declared the seat vacant and required new elections. *See, e.g.*, Hunt v. Menard, 1 Hinds § 327, p. 208, 2 Bart. 471, Rowell's Digest 226, 40th Cong., 3d Sess. (N.C. 1869); Sypher v. St. Martin, 1 Hinds § 333 p. 221, 2 Bart. 699 Rowell's Digest 241, 41st Cong., 1st Sess. (La. 1869); Benoit v. Boatner, 1 Hinds § 337 p. 227, Rowell's Digest 519, 54th Cong., 1st Sess. (La. 1896)(2 cases); Buttz v. Mackey, 2 Hinds § 920 p. 163, Smith 683, Rowell's Digest 320, 44th Cong., 1st Sess. (S.C. 1876); Horton v. Buter, 2 Hinds § 1122 p. 698, Moore's Digest 15, 57th Cong., 1st Sess. (Mo. 1902). Congress does not readily discount the results of an entire election. Where there is such widespread fraud and intimidation, however, as to put the election in doubt and to

House decided simply to set aside the election and order a new one on the theory that there had simply not been a valid election.[182] In the course of the debate it was made clear that the determination of the contest was unrelated to any question of fault by the contestee.[183]

Mr. McCall, chairman of the committee, specifically directed attention to this point:

> Furthermore, Mr. Speaker, there is nothing in the record, no evidence anywhere, that there was any special wrongdoing in connection with the election on the part of the contestee or on the part of any of the sitting members in these South Carolina contests. In one district, certainly, where they had not for years opened certain polls, where the black voters are greatly in the majority, the contestee [Mr. Elliott], before the election was held came out and urged that all the polls be opened, and it was against his protest that the polls were closed on that day.
>
> The difficulty is that a system exists, the principle of which is to disfranchise the colored voters. It is a system that permits the minority in certain districts to choose the members of the House themselves. Individuals are powerless to oppose it, and it is a duty which we owe to this Government, and even to the State of South Carolina, to refuse to seat members chosen in such manner.[184]

In the very same year in *Murray v. Ellis*,[185] another contested election case from South Carolina, the committee found the existence of a general conspiracy to prevent blacks from voting.[186] The committee's analysis of what went on in Charleston reveals quite starkly what Congress faced and how it saw its role at the time.[187]

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make it almost impossible to determine who should be seated, Congress will order a new election, ". . . in a legislative body having the power to order a new election, it is safer . . . and more conducive to the ends of justice, to order such new election . . . ." Finley v. Bisbee, 2 HINDS § 932 p. 200, 210, 1 Ells. 74, Rowell's Digest 326 (Fla. 1879).

[182] 28 CONG. REC. 5900-01 (1896).

[183] *Id.* at 5901 (1896).

[184] 29 CONG. REC. 5901 (1897).

[185] 2 HINDS § 1075 p. 597, Rowell's Digest 543, 54th Cong. 1st Sess. (S.C. 1896).

[186] 2 HINDS § 1074 p. 597.

[187] The House Elections Committee stated:

Finally, mention should be made of a series of cases coming up year after year from Louisiana for the period 1870 until 1900.[188] In the main almost all of these cases involved violence, and the House uniformly voided the elections.

In the Louisiana election cases of 1870, in the 41st Congress, the House did not limit itself to considering violence at the polls. It also directed its attention to an atmosphere of violence which it believed might have affected the result.[189] The majority of the committee found that "it is established by testimony that previous to the election a condition of terrorism was inaugurated

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> In the absence of some reasonable explanation it would indeed be strange that in a city of 65,000 population, with 8,000 colored voters and 6,000 white voters, the proportion of white voters to colored votes should be as 10 to 1.
>
> But a study of the record discloses a reasonable explanation; and that is that the supervisors fraudulently impeded and prevented the registration of colored voters, and committed intentional errors in the execution of registration certificates for illiterate voters, and that challengers, unauthorized by law, and by the sanction of the managers at the various precincts, arbitrarily passed upon the qualifications of colored voters and directed who should vote and who should not, and that in some of the precincts the dead and absent were recorded as having voted.
>
> The Board of Supervisors for the city of Charleston consisted of three men, to whom each voter was required to apply for a certificate of registration. This board was an arbitrary court, before which illiterate and ignorant voters were compelled to go and in which they had a right to place full confidence. If errors were made upon the certificates, the illiterate voters would not be able to discover them, and if an error proved fatal to his certificate the voter was helpless.
>
> A common excuse for rejection of ballots was that certificates held by the voter failed to give the number of the precinct, or the correct number of the ward in that the errors were made by the supervisor of registration, and whether intentional or not should not operate against the voter. The common character of the apparent mistakes, and their frequency, strongly and conclusively indicate that they were intentional, and made for the purpose of depriving the holders of the certificates of their ballots.
>
> The evidence strongly shows that the supervisors of registration in Charleston threw every possible obstacle in the way of a full and fair registration. By delay in the issuing of certificates, by seeming investigations, by excuses, by favoritism, and by discrimination against the colored voters, unquestionably many hundreds were prevented from registering.

H.R. REP. No. 1567, 54th Cong., 1st Sess. (1896).

[188] Among the most significant were: Hunt v. Menard, 1 HINDS p. 211; Hunt v. Sheldon; Sypher v. St. Martin; Newsham v. Ryan; Darrall v. Bailey, 1 HINDS § 328 p. 212, § 331 p. 218, 41st Cong. 1st Sess. (La. 1869); Benoit v. Boatner (2 cases), 1 HINDS § 337 p. 227, Rowell's Digest 519, 54th Cong. 1st Sess. (La. 1896).

[189] 1 HINDS at 218.

in the parishes in question."[190] In the Louisiana election of 1867, the Republican vote in the parishes in question, almost exclusively black, was 38,335.[191] After the inauguration of what the committee characterized as "organized intimidation," the Republican black vote dropped in the congressional elections of 1868 to 3,359, although there were at that time in those parishes 42,693 black registered voters.[192] The contestee in the Louisiana cases argued that there did not appear to be violence at the polls but the committee specifically rejected this contention in the light of the pre-election conditions.[193]

Twenty-five years later, the House was again confronted with a case coming from Louisiana, *Benoit v. Boatner*.[194] Again an election was set aside.[195]

The 1890's were the turning point in the exercise of congressional power to protect the voting rights of black people. Despite earlier precedents, the House refused to interfere with the new method of curbing black voting as developed in the 1890 Constitution of Mississippi and replicated in other states.

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[190] *Id.*

[191] H.R. REP. No. 38 at 1.

[192] *Id.* The committee approach to Hunt v. Meard is refreshingly realistic:

> The smallness and wonderful decrease of the Republican vote, the vastness and wonderful increase of the Democratic vote, and its exact coincidence for both Congresses, are all somewhat strange and not easily susceptible to satisfactory explanation on the theory of a fair and honest election.

1 HINDS at 211.

[193] H.R. REP. No. 38 at 44.

> If it be said that there might not have been any violence, the answer is that recent events had raised a reasonable apprehension of danger, sufficient in law to cause a man of ordinary prudence to so act as to avoid the probable danger.
>
> It may be said that because the statutes of Louisiana provide that actual violence at the polls should void the election, therefore no election can be set aside for violence at any other time or place, however it may affect the minds or conduct of electors; and this may have been the view of the Democratic leaders in causing or permitting cessation of violence immediately before the day of election, and in keeping the peace among themselves at the polls. They may have supposed that they could violate the spirit of the State statute without incurring the penalty of its letter. It is submitted that no such views of law should be allowed to prevail.

H.R. REP. No. 38, *supra* note 139, 1 HINDS at 219, 2 Bart. 703.

[194] 1 HINDS § 337 p. 227, Rowell's Digest 519, 54th Cong., 1st Sess. (La. 1896).

[195] *Id.*

In 1896, three challenges were filed in the House in respect to elections held in Mississippi; *Newman v. Spencer*, *Ratliff v. William*, and *Brown v. Allen.*[196] Each of these contests was dismissed upon the following basis: No testimony had been presented to the committee; the contestant claimed that section 241 of article XII of the Mississippi Constitution of 1890 was in contravention of the fourteenth amendment and the Act of February 23, 1870, admitting Mississippi to representation in Congress; and since mere unconstitutionality of the Mississippi Constitution would necessarily deprive the state of representation, the committee would not decide the case in the absence of testimony.[197] This evident loss of interest in state disfranchising statutes roughly coincided with congressional repeal in 1894 of the bulk of the Reconstruction statutes with a committee report stating, "[l]et every trace of reconstruction measures be wiped from the books: let the States of this great union understand that the elections are in their own hand, and if there be fraud, coercion, or force used they will be the first to feel it."[198]

A few years later, the House further signalled a weakening of its resolve to take action in cases where exclusion of blacks was claimed.[199] In a case coming from Virginia involving Carter Glass, the issue was whether a newly adopted constitution of Virginia resulted in the disfranchisement of blacks.[200] The committee, after recognizing the seriousness of the issue, voted to postpone the matter indefinitely.[201]

The *coup de grace* to congressional consideration of the exclusion of blacks from the electoral process by the spate of state constitutions adopted toward the end of the nineteenth century was struck in 1904 in the case of *Dantzler v. Lever* which involved a contest from the seventh district of South Carolina.[202] The contention was that the 1895 state constitution, by virtue of its education and property qualifications, disfranchised blacks in violation of the Reconstruction Act of June 25, 1868, which readmitted South Carolina to representation in Congress.[203]

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[196] H.R. Rep. Nos. 1536, 1537, and 1538, 54th Cong., 1st Sess. (1896); 1 Hinds § 754 p. 976.

[197] *Id.*

[198] H.R. Rep. No. 18, 53d Cong., 1st Sess. 7 (1893), *quoted in* United States v. Classic, 313 U.S. 299, 335 (1941). It was during President Cleveland's second presidency (1892-1896) that the Democratic Party for the first time since the Civil War controlled both Houses of Congress and the presidency. Congressional Quarterly Guide to Congress, 896-97 (3d ed. 1982)(political party affiliation in Congress and the presidency, 1789-1981).

[199] *Carter Glass*, H.R. Rep. No. 2915, Moore's Digest 16, 57th Cong., 2d Sess. (Va. 1902).

[200] *Id.*

[201] *Id.*

The reaction of the committee was remarkably different from that which characterized its earlier opinions as described above.[204] In effect, it surrendered all the powers it had earlier zealously guarded and suggested that the entire matter be settled by the Supreme Court of the United States.[205]

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[202] 2 Hinds § 1134 p. 742, Moore's Digest 25, 58th Cong., 2d Sess. (S.C. 1904).

[203] *Id.*

[204] *See supra* note 181 and accompanying text.

[205] The committee said:

> If the Seventh district of South Carolina were the only district involved it might be proper for the Committee on Elections, as well as the House itself, to put on record its opinion in the case and to declare elected or not elected, as that opinion might run, the contestee. But the reconstruction acts were not confined to South Carolina. Practically the same "fundamental conditions" are found in the acts readmitting Virginia, North Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, and Arkansas to representation in Congress. Most of these states have adopted new constitutions said to be in conflict with the terms and provisions of the reconstruction acts readmitting them to representation in Congress.
>
> ***
>
> However desirable it may be for a legislative body to retain control of the decision as to the election and qualification of its members, it is quite certain that a legislative body is not the ideal body to pass judicially upon the constitutionality of the enactments of other bodies. We have in this country a proper forum for the decision of constitutional and other judicial questions. If any citizen of South Carolina also was entitled to vote under the constitution of that State in 1868 is now deprived by the provisions of the present constitution, he has the right to tender himself for registration and for voting, and in case his right is denied, to bring suit in a proper court for the purpose of enforcing his right or recovering damages for its denial.
>
> That suit can be carried by him, if necessary, to the Supreme Court of the United States. If the United States Supreme Court shall declare in such case that the "fundamental conditions" in the reconstruction acts were valid and constitutional and that the State constitutions are in violation of those acts, and hence invalid and unconstitutional, every State will be compelled to immediately bow in submission to the decision. The decision of the Supreme Court would be binding and would be a positive declaration of the law of the land which could not be denied or challenged.

The disingenuousness of this recommendation is evident from the fact that it was rendered on March 18, 1904, with full knowledge that less than a year previously the Supreme Court in *Giles v. Harris* had refused to consider these issues, claiming they were political questions.[206]

Contests of elections occasioned by the exclusion of blacks from the voting process by registration laws continued for a number of years; they were never successful.[207]

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> A majority of the Committee on Elections No. 1 doubt the propriety in any event of denying these Southern States representation in the House of Representatives pending a final settlement of the whole question in proper proceedings by the Supreme Court of the United States . . . .

Dantzler v. Lever, 2 Hinds § 1134 p. 743-44, Moore's Digest 25, 58th Cong., 2d Sess. (S.C. 1904).

[206] 189 U.S. 475 (1903), *supra* notes 63-66 and accompanying text.

[207] *See, e.g.* Houston v. Broocks, 1 Hinds, § 643 p. 854, Moore's Digest 33, 59th Cong., 1st Sess. (Tx. 1906)(committee refused to consider question of constitutionality of Texas poll tax law); Warmoth v. Estropinal, 6 Cannon § 127 p. 231, Moore's Digest 41, 61st Cong., 2d Sess. (La. 1910)(committee refused to consider questions as to constitutionality of Louisiana election law); Richardson v. Lever, Prioleau v. Legare, and Myers v. Patterson, all cited as 6 Cannon § 128 p. 232, Moore's Digest 42, 61st Cong., 2d Sess. (S.C. 1910), were three cases in which an effort was made to have Congress reconsider *Dantzler*. The committee flatly refused to do so, stating the following:

> Although it has been held by the majority of the Elections Committee again and again, with each recurring contest of a similar nature, that the forum in which to test the constitutionality of a state constitution was rather in the courts of the nation than before a committee in Congress, such contests have persistently and contrary to the suggestion of the members of the majority continued to bring these pseudo contests before Congress, although each time there is found to be nothing differentiating the contest now before us from former ones from said State and district, and in none of which has there even been the slightest ground for action favorable to contestant even construing the words of the Federal Constitution that each House of Congress is the judge of the elections, returns, and qualifications of its own Members, in their broadest sense. The constitution of South Carolina has been in force for fifteen years, thus affording ample time to those who question same to test the validity thereof in the highest court in the land, and the courts are still open for such consideration.
>
> If there be any who desire to raise the question of the constitution and election laws of a State being in conflict with Federal statutes or our national organic law, we consider such a matter should be tested in the courts.

6 Cannon, at 234.

Mr. Prioleau was particularly persistent in his contests with Mr. Legare. In a 1912 contest he is rejected with the following statement by the committee:

> This contestant has been informed by four previous committees of the House

Thus Congress passed the buck to the courts; the courts passed the buck to Congress and the executive; and the executive had already walked away from the issue in 1877.[208] The result was for all practical purposes a general submergence of black voting in the South, a condition that remained substantially unaltered until the voting rights movement of the 1960's.

IV. THE ANATOMY OF THE 1965 CHALLENGE

As of 1965, Title 2 of the United States Code, sections 201-226 provided a detailed procedure for presenting an election contest.[209] The statute required that a notice of intention to contest (hereinafter referred to as notice of contest) was required to

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> that the forum in which to test the constitutionality of a State constitution is in the courts of the Nation, which are continuous bodies and recognize their own decisions and judgments, and not before a committee of Congress the political complexion of which is subject to change, and whose decisions are not binding upon the succeeding Congresses, not alone for political reasons but because of honest differences of opinions as to the interpretation of the provisions of the Constitution itself.

Id. at 241.

Undaunted, Mr. Prioleau tried again in 1916 against a different contestee and was again turned down with the committee stating that he "has been the contestant in six or seven contested election cases . . . In each case this same question was involved."

While *Dantzler v. Lever* seemed to involve only the question of the alleged conflict with the readmission statute, the subsequent cases make clear that the same analysis was applied to claims of fourteenth and fifteenth amendment violation. *Id.*

[208] *See supra* note 33 and accompanying text.

[209] 2 U.S.C. § 201-26 (1965). The statute has been on the books substantially unchanged since the mid-1800's. It was amended in 1969 and is now set forth in 2 U.S.C. § 381. The most important substantive change is that as of 1965, the statute permitted a contest by "any person" whereas under the 1969 amendments the contest procedure is available only to a person who had been "a candidate for election to the House of Representatives and [is] claiming a right to such office." Of course the House has the power to entertain a contest from any person - even one who has not been a candidate. It may be, however, that under the new statute, a non-candidate does not have the power to invoke the deposition procedure which is automatically available to a contestant without further action from the House when a losing candidate files a contest.

A House Committee report states that the amendatory bill "results from the House administration recommendation in the Mississippi cases of 1965" H.R. REP. No. 2219, 89th Cong., 2d Sess. 2 (1965). When the House considered the amendments, Rep. Ryan of New York, a leading spokesman for the Mississippi challenge (*see infra* note 302), unsuccessfully argued that challengers who were not candidates because they had been barred from participating (as occurred in the Mississippi case) should have the full measure of available procedures to prove their case, including depositions. *See* 115 CONG. REC. 30507, 30512-13 (1969).

be served upon the contested member "within thirty days after the result of such election shall be determined by the officer or board of canvassers authorized by law to determine the same. . . ."[210] Thirty days after such service, the contested member was required to answer such notice "admitting or denying the facts alleged therein, and stating specifically any other grounds upon which he rests the validity of the election."[211] Thereafter, ninety days were provided for the taking of desired testimony by deposition under the following schedule: a) forty days for contestant; b) forty days for contestee; c) ten days for contestant's rebuttal.[212]

After the testimony was procured, it was then required to be sent to the Clerk of the House who, after a conference with parties and/or their attorneys, would send to the Public Printer "such portions of the testimony as the parties may agree to have printed."[213] In the event of any disagreement between the parties as to printing "of any portion of the testimony, the said Clerk shall determine whether such portion of the testimony shall be printed. . . ."[214]

The printed record, as well as those portions of the testimony not printed, was then required to be delivered by the Clerk to the Subcommittee on Elections of the House Administrative Committee "at the earliest opportunity."[215]

On December 4, 1964, a notice of contest was served by each of the five persons claiming the right to be seated as a member of Congress from their respective congressional districts in Mississippi.[216] Each of the contestants was a prominent person in the Mississippi Freedom Democratic Party.[217]

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[210] 2 U.S.C. § 201 (1965), *repealed by* 2 U.S.C. § 381 (1969).

[211] *Id.* at § 202.

[212] *Id.* at § 203.

[213] *Id.* at § 222-23.

[214] *Id.* at § 223.

[215] *Id.*

[216] Except as to the Third Congressional District, the notices of contest as well as the answers to them are printed at the end of the document entitled *Contested Elections in the First, Second, Third, Fourth and Fifth Districts of the State of Mississippi: Hearings Before the Subcomm. on Elections of the Comm. on House Adm.*, 89th Cong., 1st Sess. (1965) [hereinafter *Contested Elections Hearings*]. The notice and answer related to the Third C.D. were not printed because the clerk claimed he had not received a signed copy of the notice. *See Contested Elections Hearings*, at 75; *see also infra* note 236.

The notices of contest[218] recited that the contestees were purportedly elected at general elections held on November 3, 1964, but that these elections were invalid because blacks, constituting approximately fifty percent of the population, were unlawfully excluded from participation therein.[219] This exclusion, it was alleged, was accomplished by the following methods:

> (a) Black citizens were systematically and deliberately excluded from the electoral process in Mississippi through the utilization of unconstitutional registration and election statutes.
> (b) They were systematically and deliberately disfranchised and excluded from the electoral process in Mississippi by acts and threats of violence, terrorism and intimidation directed against them.[220]

The notices of contest also set forth that black candidates in the primary elections were in effect excluded from any meaning-

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The notices of contest are very extensive documents which quote at length the complaint filed by the Department of Justice in *United States v. Mississippi*, then pending before the Supreme Court. In this manner, the notices of contest relate the entire history of the disfranchisement of blacks. In addition, on the issue of violence the notices detail separately for each C.D. the acts of violence as set forth in the complaint filed in COFO v. Rainey, 339 F.2d 898 (5th Cir. 1964). *See supra* note 119.

[217] Contestants were: Augusta Wheaton (1st C.D.), Fannie Lou Hamer (2d C.D.), Mildred Cosey, Evelyn Johnson, and Allen Johnson (3d C.D.), Annie Devine (4th C.D.), and Victoria Gray (5th C.D.). Contestees were: Thomas G. Abernethy (1st C.D.), Jamie L. Whitten (2d C.D.), John Bell Williams (3d C.D.), Prentiss Walker (4th C.D.), and William Meyers Colmer (5th C.D.). *Contested Elections Hearings, supra* note 216, at 15.

[218] *Id. See also* Brief of Contestants Urging the Vacating of the Contested Seats and the Holding of New Elections at 5 [hereinafter *Brief of Contestants*](summarizing Notices of Contest).

[219] *Brief of Contestants* at 4.

[220] *Id.* at 5. The notices of contest further charged that the purported primary and general elections, upon which the contestees claimed their seats, were void because:
-They violated the 1870 compact between the State of Mississippi and the Congress of the United States readmitting Mississippi to representation therein;
- They violated article I of the Constitution of the United States which requires that "the House of Representatives shall be composed of Members chosen every second year by *the People* of the Several States . . . ." (emphasis added);
- They violated the thirteenth and fifteenth amendments to the Constitution of the United States, and the laws enacted pursuant thereto, such as 18 U.S.C. §§ 241-2; 42 U.S.C. § 1971 *et seq.*; 42 U.S.C. § 1981 *et seq.*; and the Civil Rights Acts of 1866, 1871, 1957, 1960 and 1964. *Id.*

ful participation therein because of the almost total exclusion of black citizens from the list of registered voters.[221] In addition, the notices of contest asserted that in respect to the three congressional districts in which the contestants had sought to run as independents in the election, the Secretary of State had unlawfully refused to place their names on the ballots.[222] The notices further alleged that by reason of the almost total exclusion of black citizens from the Mississippi congressional elections of 1964, the black people of Mississippi ran their own "freedom" elections from October 30 to November 2, 1964, as a result of which the contestants, who had sought to run as independents in the "regular" elections, were elected.[223]

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[221] *Id.* In view of the emphasis placed by the House Administrative Committee upon the fact that the contestants were not "candidates" whose names appeared on the ballots, the following facts, as alleged in the notices of contest, are relevant to the efforts of three of the contestants to run as independents:

> Sec. 3260 of the Mississippi Code of 1942, as amended, requires that an independent nominating petition for a congressional election need contain the signatures of at least two hundred qualified voters residing in the district concerned. Pursuant to this provision, contestants Fannie Lou Hamer, Annie Devine and Victoria Gray attempted to file with the State Board of Elections, as required by law, independent nominating petitions containing the requisite number of signatures.
>
> Heber Ladner, the Secretary of State and the secretary and a member of the State Board of Elections, refused to accept such petitions although they were in regular and appropriate form and timely offered for filing as required by state law. He ruled that every signature thereon had to be certified by the appropriate voting registrar as being that of a registered voter.
>
> Although there is no requirement in section 3260 or in any other applicable statute for such certifications, the contestants attempted, in good faith, to obtain them. The registrars concerned made it impossible by a variety of unlawful techniques for the contestants to obtain such certifications in time to file their independent nominating petitions with the Secretary of State by October 1, 1964. These techniques ranged from outright refusals to certify to the unconstitutional requirement that all signers must have paid their poll taxes.

Brief of Contestants at 6-7.

The notices of contest as printed in the contested election hearings for unexplained reasons do not contain detailed material relating to efforts to get on to the ballots, which was designated as an appendix to the notices.

[222] *Brief of Contestants* at 6.

[223] *Id.* at 8. The allegations in the notices of contest with respect to the "freedom" elections were as follows:

> These elections, which were held throughout the state from October 30 to November 2, 1964, were conducted in exactly the same manner as the "regular" elections except that unlike the "regular" elections they were open to all citi-

On the opening day of Congress, throughout the capitol area, hundreds of Mississippians and other supporters of the MFDP were buttonholing members of Congress to obtain their help.[224] The issue had gained some broad support,[225] and indeed the MFDP had conducted a nationwide lobbying campaign with "committees in most of the large urban areas of the country which were lobbying their congressmen on the home ground to support the challenge."[226] Though some of the forces that had sought to pressure the MFDP into accepting President Johnson's offer at Atlantic City sought now to discredit the congressional challenge, the Reverend Martin Luther King, Jr. and James Farmer of the Congress of Racial Equality (CORE) endorsed it, thereby assuring the broad base of its support.[227]

On January 4, 1965, the opening day of Congress, Congressman William Fitts Ryan, joined by other members of the House, objected to the administration of the oath to the contestees.[228]

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zens who had the qualifications required by Mississippi law without intimidation or discrimination as to race or color. The names of all candidates, including those of contestee, appeared on the ballot. The results of such elections in the Second, Fourth and Fifth Districts were as follows:

(1) Second District: Fannie Lou Hamer — 33,009
Jamie L. Whitten — 59
(2) Fourth District: Annie Devine — 9,067
Arthur Winstead (D) — 4
Prentiss Walker — 0
(3) Fifth District: Victoria Gray — 10,138
William Meyers Colmer — 0

Id. at 8.

[224] *More than 600 young men and women came from Mississippi to dramatize the challenge*, N.Y. Times, Jan. 5, 1965, at 1, col. 3. A Washington Post editorial on January 1, 1965, under the heading *Pretenders in Congress*, argued that it was "high time for Mississippi to learn that the country is not altogether indifferent to its contempt for the Constitution. And it is high time for the House of Representatives to give some thought to the integrity of its own membership."

[225] *See* 111 CONG. REC. 24,269 (1965). The list of organizations which supported the challenge included: A. Phillip Randolph Foundation, ACLU, Brotherhood of Sleeping Car Porters, Catholic Interracial Council, National Council of Churches - Commission on Religion and Race. *Id. See also* 111 CONG. REC. 24,274-75 (statements adopted by organizations in support of challenger entered into congressional record).

[226] Minnis, *supra* note 5, at 274.

[227] *Id.* at 273.

[228] 111 CONG. REC. 18-19 (1965). Congressman Ryan took a leading role in the challenge. He had been a supporter of the civil rights movement and Andrew Goodman, one of the three young men murdered in Mississippi, had come from his district.

The Speaker of the House then administered the oath to all but the contestees.[229] Thereupon, after some debate, the House adopted a resolution to the effect that the oath would be administered to the contestees but the resolution was adopted with the clear statement from the majority leader that "any question involving the election of the members in question, is one which should be dealt with under the laws governing contested elections."[230] The vote on this resolution was 276 to 149,[231] much to the surprise of the Mississippi political establishment and despite the fact that the Democratic administration had given the word that the challenge was not to be supported.[232] Indeed, the resolution seating the Mississippians was presented by the Democratic leader of the House, Carl Albert of Oklahoma.[233] The events on the opening day of Congress made it apparent that a significant portion of that body viewed the contests as legitimate and the contestees had no choice but to face them seriously.[234]

Directly after the vote on the opening day of Congress, the contestees served and filed their answers as required by statute.[235] They contended: (1) that the contestees were not properly

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[229] *Id.* at 20.

[230] *Id.* at 19.

[231] *Id.* With the support of Congressman Ryan and others, the MFDP had sought the adoption of what was referred to as the "Fairness Resolution," which would have deferred the swearing in of the Mississippi congressmen until the challenge was completed. *Id.* at 50.

[232] Pearson, *Seating Vote Surprised Salons*, Atlanta J. Jan. 8, 1965.

[233] 111 CONG. REC. at 19.

[234] *Id.* at 18-19. As was stated in the W.F. Minor's News column entitled *Eyes on Mississippi*:

> No longer is Mississippi political leadership taking lightly the challenge to the seating of the state's five Congressmen . . . . When the delegation was seated at the opening of Congress, official thinking here was that the protest was over. But some saw the seriousness of the situation when 148 members of Congress without any evidence, voted to prevent the Mississippi delegation from taking seats . . . . That meant a shift of only about 80 more votes in the House could take away the Mississippi seats.
>
> The drive against Mississippi took on more gravity here when civil rights lawyers from New York took up the case and pulled out an 1851 federal statute to require testimony from witnesses in support of their challenge.

Minor, *Challenge to Delegation Seen as Serious Matter*, New Orleans Times Picayune, Jan. 31, 1965.

[235] Minnis, *supra* note 5, at 274 tells it thusly:

> J.P. Coleman, the Mississippi politician who was the lawyer for the challenged

served; (2) that the contestants lacked standing because they were not on the ballot; (3) that they knew nothing of the exclusion of blacks from the electoral process; and (4) that the Mississippi laws had not been declared unconstitutional by any court and must be presumed to be constitutional, and that any question of constitutionality was within the jurisdiction of the Supreme Court and not Congress. Finally, (5) answering the contention that Mississippi had violated the compact upon which it was readmitted to the Union, the answers allege that the compact was void and that since the same deficiency would apply to the other southern states, the House of Representatives had declined to go along with this contention in "the South Carolina and Texas cases of 1904 and 1906." The answers thus invoked the *Dantzler* case and its progeny.[236]

The directive from Congress that "the laws governing contested elections" would apply "to any question involving the election of the members in question" led to the next step; the taking of depositions to establish a factual foundation for the challenge.[237]

The statute specifically authorized contestants to take depositions for forty days.[238] The magnitude of this task was in sharp contrast to the available resources. There were only three black lawyers in Mississippi at the time and, while there were undoubtedly a few sympathetic white lawyers, it would have been

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> congressmen, was sitting in the House gallery holding the answers to the challenge papers which had been filed on the Mississippians on December 4. They had thirty days in which to answer. January 4 was the last day. Coleman did not serve the answers on the Freedom candidates until after the sizeable vote. The supposition is that if the MFDP had not received substantial support on January 4, the Mississippians would simply have ignored the challenge and that would have been the end of it. However, after the vote, Coleman served the answers on the Freedom challengers and the Mississippians thus acknowledged the political seriousness of the challenge.

Id.

[236] *Contested Elections Hearings*, *supra* note 216, at 113-119; 136-139; 158-161; 180-183 (answers of Abernathy, Whitten, Walker, and Colmer). *See also* Papers Omitted in Printing Pursuant to Provisions of the Statutes Involving the Five Congressional Districts in the State of Mississippi, Eighty-ninth Congress, Committee on House Adm., 89th Cong., 1st Sess. 2,929-31 [hereinafter *Deps*] (John Bell William's answer reprinted).

[237] 111 CONG. REC. 19 (1965).

[238] *See supra* notes 210-15 and accompanying text.

professionally disastrous and could have been life-threatening for any of them — white or black — to assist in depositions.[239] Accordingly, attorneys for the contestants, through personal calls and press conferences in New York and California, recruited more than 150 attorneys from throughout the nation who volunteered their time, as well as their travel and other expenses, to take the depositions.[240] Indeed, some of them brought court reporters with them.[241] This team of attorneys conducted depositions in communities throughout Mississippi,[242] as well as a number of cities outside of Mississippi for witnesses who could testify about relevant facts.[243] In all, they took the depositions of more than 400 witnesses, which were transcribed in more than 10,000 typed pages of testimony and, when printed by the House, resulted in 3000 pages of small print.[244] Each of the depositions was taken formally; the contestees were given notice of the depositions and were represented by counsel, who were permitted, if they chose, to cross-examine witnesses.[245] In many cases, the cross-examination was vigorous. Four of the contestees attended some of the depositions. In view of the posture of Congress on the opening day, there was no possibility of the contestees ignoring the depositions or even taking them casually.[246]

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[239] One of the prominent out-of-state attorneys who took depositions wrote to the author recently, as follows:

> There was tremendous hostility shown to the attorneys taking the depositions. At times onlookers outside the courthouse or registrar's office where depositions were taken taunted the attorneys as they were entering or leaving. The attitude of many of the southern lawyers however was quite different. On a number of occasions I was personally contacted by one or more of them who said that we were performing a great and necessary task and that they were sorry that they didn't dare participate themselves. A few of the attorneys did display some hostility but that was not the general pattern.
>
> We went into one town where a strike was going on and the streets were filled with "red necks" who gave us the most hostile reception that we received anywhere. On that occasion the deposition of the registrar was taken in the courthouse. At the noon break we announced that we would send out for some sandwiches and stay in the room until the session resumed. Everyone else left but a few minutes later one of the attorneys returned and told us that it was very unwise for us to stay in the room because the building would not be guarded during the noon hour and we would be sitting ducks for a group of the strikers who were gathered outside the building. He suggested that we go to the same restaurant where they were going and stick near them during the noon hour. We gratefully followed the advice and suffered nothing more than verbal abuse.
>
> This attorney and others informed us that the only reason that we were not physically attacked is that the Governor had sent out strongly worded instructions that nothing was to happen to any of the people involved in the taking of depositions.

Letter from Ben Margolis to Morton Stavis (Oct. 1988)(describing personal experience in taking depositions for contestant).

[240] 111 CONG. REC. at 1944-45 (Senator Eastland reads New York Times article of Jan. 11, 1965 on lawyers volunteering to go to Mississippi and take depositions). See Appendix A which lists the 153 attorneys who aided in the taking of the depositions and their states of origin, as set forth in the brief of contestants.

[241] *See, e.g., Deps.* at 885 (two court reporters brought to record proceedings asked to leave Skyline Motel in Batesville after motel management discovered they were connected with congressional challenge deposition). *Id.* at 1778 (shorthand reporter and notary public from New York). *Id.* at 2915 (shorthand reporter from California).

[242] *Deps.* at xvii-xxv. Jackson (Hinds Co.), Aberdeen (Monroe Co.), West Point

The practical problems that had to be coped with by the attorneys for the contestants in the deposition procedure were enormous. The lawyers did not come at the same time; they came in shifts, agreeing to work either one week or two. Not all of them actually took depositions. They divided their work so that the majority of them interviewed witnesses and prepared them for testifying when other attorneys would question them. The working relationship between the lawyers, and civil rights workers and other local people was excellent. The lawyers quickly disabused themselves of any notion that their task was simply the formal taking of the depositions on information which had been prepared for them in advance. They realized

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(Clay Co.), Starkville (Oktibbeha Co.), Greenwood (Leflore Co.), Greenville (Washington Co.), Holly Springs (Marshall Co.), Clarksdale (Coahoma Co.), Cleveland (Bolivar Co.), Indianola (Sunflower Co.), Batesville (Panola Co.), Glendora (Tallahatchie Co.), Natchez (Adams Co.), Vicksburg (Warren Co.), Magnolia (Pike Co.), Tylertown (Walthall Co.), Liberty (Amite Co.), Meridian (Lauderdale Co.), Canton (Madison Co.), Brandon (Rankin Co.), Hattiesburg (Forrest Co.), and Laurel (Jones Co.).

[243] *Id.* at xxv-xxvi. Palo Alto, San Jose and San Francisco, Calif.; Chicago, Ill.; Detroit, Mich.; New Haven, Conn.; Washington, D.C.; New York, N.Y.; Boston, Mass.; and Newark, N.J. The witnesses who testified in these depositions were mostly persons who had come to Mississippi on various assignments and were able to supply information. *See, e.g. Deps.* at 2739 (field workers for Congress of Racial Equality (CORE)); *Id.* at 2757 (volunteer attorney for Lawyers Constitutional Defense Committee); *Id.* at 2618 (director of Freedom Schools in Mississippi Summer Project); *Id.* at 2642 (Council of Federated Organizations, (COFO) voter registration worker).

[244] *See Deps.*

[245] *Id.*

[246] *See supra* note 224-35 and accompanying text.

that they had to interview witnesses and work closely with the civil rights workers in ferreting out the available material.

In view of the short time allotted for depositions under the statute, most of them were taken in the month of February 1965.[247] On some days, depositions were taken in several locations on the same day, with teams of lawyers working separately.[248] One of the problems was locating notaries public who would be willing to preside and places which were suitable.[249] Thus, some depositions were taken at church facilities, a college, Freedom Houses (voter registration centers), and a grand lodge.[250] Many of the depositions were taken at county or federal courthouses.[251] The entire operation, including the assignment of lawyers to their separate localities and orienting them as to what needed to be established at the depositions, was administered out of the MFDP office in Jackson, Mississippi.[252]

Chief counsel for the contestees was James P. Coleman, former Governor of Mississippi, who represented Congressmen Colmer, Whitten, Abernethy, and Williams.[253] B.B. McClendon, Jr. represented Congressman Walker.[254] Since the depositions were taken throughout the state and sometimes at several different places at the same time, additional counsel was needed to represent the contestees.[255]

Most of the witnesses called were local black citizens who recounted their personal experiences trying to register and their brushes with violence and obstruction.[256] There was also testimony by voter registration workers detailing some of their experiences in seeking to register voters.[257] Adverse witnesses were also called, notably former Governor Ross Barnett, Theron Lynd, Registrar of Forrest County, Heber Ladner, Secretary of State, Joe Patterson, State Attorney General, and others.[258]

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[247] *See Deps.* at xvii-xxvii.

[248] *Id.*

[249] *Deps.* at 2466-67 (Coleman, counsel for contestees, acknowledging difficulty, offering to assist in finding notaries and suitable places).

[250] *Deps.* at xvii-xxvii.

[251] *Id.*

[252] The author, on behalf of the team of attorneys representing the MFDP, was stationed in Jackson for the period of the depositions and prior thereto. In addition to taking some of the depositions, he was responsible for coordinating the work of the lawyers who participated in the program.

[253] *Deps.* at 1-2.

[254] *Id.* at 2.

[255] *See generally Deps.* (counsel listed at beginning of each deposition).

[256] *See infra* notes 263-271 and accompanying text.

The deposition program evoked bitter protest from the establishment. Senator Eastland led the attack on the floor of the Senate against counsel for the challenge,[259] and the local press chimed in, charging in effect that a horde of outside lawyers was invading the state and that the deposition program was a plot by communists.[260] It was clear, however, to all parties that had the depositions procedure been obstructed, the national spotlight would have been focused on Mississippi in a manner that could have imperiled the standing of the state in Congress.[261]

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[257] *See infra* note 263.

[258] *Deps.* xxv-xxvii (alphabetical listing of deponents).

[259] 111 CONG. REC. at 1943-53; "It's an attempt to take over the state of Mississippi by the Communist party,' Senator Eastland said . . . [and] efforts of the Freedom Democratic Party, a predominantly Negro group, to unseat the state's Democratic House members was 'a Communist planned attempt to influence the Congress of the United States' " N.Y. Times, Feb. 4, 1965, at 22, col. 7.

[260] Clarion-Ledger, Feb. 4, 1965, at 1, col. 5 (Sen. Eastland blasts FDP as Red-Infiltrated); Clarion-Ledger, Feb. 11, at 2B, col. 4 (FDP Attorney Linked to Communist Party); Clarion-Ledger, Feb. 14, at 4B, col. 3(same).

[261] The outward calm that prevailed during the taking of the depositions was no accident.

> Within three weeks [of the January 4 vote in Congress], the Governor, the Lieutenant Governor, the Mississippi Economic Council (state chamber of commerce), the state Sheriff's Association, and the Association of Circuit Clerks (voter registrars) and various other organizations had denounced violence and oppression against Negroes, and had called for law and order. Governor Johnson was particularly transparent in his conversion. He specified that the critical period for maintaining a civilized attitude in Mississippi would be the next six months — the period of the pendency of the challenge!

Minnis, *supra* note 5, at 275.

As Governor Johnson said:

> I am sure our people understand the absolute necessity for preserving peace and good order so that there will be no incident or occurrence of any kind which might be used to the detriment of our state.

Tupelo Daily J., Jan. 28, 1965, at 11, col. 1.

Letters from Congressmen went out to sheriffs and law officers where the depositions were taken, asking them to prevent any incidents during the hearing which might hurt the congressmen's defense. Tupelo Daily J., Feb. 10, 1965, at 13, col. 4.

The governor decided not to call a special legislative session. The Jackson Daily News quoted a capitol source as saying Johnson felt an immediate session, which could involve anti-federal government action, could damage the delegation's case to retain its seats.

Though the statute authorized the contestees to take depositions for a further period of forty days, they chose not to do so, relying instead on their position that the contestants had no standing.[262]

Space permits only a brief summary of the 3,000 fine print pages of depositions, which detailed a wide range of conduct employed by local citizenry and officialdom to prevent or frighten blacks from registering and/or voting. The categories of such conduct included pervasive violence and threats of violence in addition to the well-known cases of murder that had achieved national attention.[263] There were numerous instances of the

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Tupelo Daily J., Jan. 29, 1965, at 1, col 8. *See also* 111 CONG. REC. at 14,441 (Rep. Roosevelt reads article stating same).

[262] *Contested Elections Hearings*, *supra* note 216, at 24.

[263] Law enforcement officers were sometimes joined by local businessmen in trying to intimidate blacks from coming to the courthouse to register. A resident of Canton testified that white businessmen armed themselves and marched on the square in response to the Freedom Day March. "[The businessmen were] [m]arching all up and down the street and everywhere so you couldn't come by, with shotguns and pistols and what not. I noticed when I came beneath the courthouse, I just remembered who the officer was, — and when I went by, I had on a CORE shirt and he said, 'Smart black son of a bitch.' " *Deps.* at 2186. SNCC workers driving in the Delta on their way back from a voter registration drive in Greenwood were shot at. Two Greenwood businessmen associated with the White Citizens' Council were indicted but not brought to trial. One worker "caught a slug which turned out to be a .45 in the back of his neck and he was almost killed. The doctor said that it came within an inch of hitting the center of his brain. And it turned out that there were 13 bullet holes just sort of snaked along the side of the car." *Id.* at 1603. After a resident of Monroe County allowed her house to be used for voter registration meetings, she received a letter saying, "We got your number, so be aware. Anything could happen to you. Just a warning. 'Old Smarty.' " *Id.* at 33. A minister active in voter registration received threatening phone calls that his house "was going to be the next one to be bombed". *Id.* at 486. Two residents of Ruleville testified to their house being fired upon after they allowed civil rights workers to stay with them. *Id.* at 757-58, 764-65. In one of these incidents a woman suffered a fractured skull and her 15-year-old granddaughter received an injured hand. The mayor of Ruleville appeared at the scene and said, "Yes, I have been expecting this. Some more should have gotten the same thing, some more around here should have gotten the same thing." *Id.* at 764. A resident of McComb testified that after she tried to register "a bomb was throwed in my yard and it was ten sticks of dynamite." *Id.* at 1329. Another resident of McComb also said she was afraid to register to vote because "along at that time they were doing some bombing." *Id.* at 1557. A black resident born in Amite County and having lived there all her life testified to the killing of her husband, who was an eyewitness to another black's murder by a state senator. All three blacks were active in the NAACP. The senator shot the black in the course of an argument. Because of threats, the witness's husband testified falsely to the grand jury but subsequently he told the truth to the FBI. *Id.* at 1475.

burning of churches or other facilities where voting rights activ-

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Thereafter he was harassed by the local sheriff and suffered such economic retaliation as the cut-off of his supply of logs for his logging business and the denial of credit. *Id.* at 1473. "Someone shot his four fingers off and after they shot his fingers off, he run under the truck for protection and then someone put the gun aside of the truck and shot him through the head." *Id.* at 1471. An Amite County resident described how Bob Moses, a SNCC leader who criss-crossed the state explaining the voter registration process and leading groups to the courthouse, was beaten by a highway patrolman across the street from the courthouse. ". . . I didn't go along with Bob Moses up to the courthouse . . . when he returned him that afternoon, when, I — when he got out of the car, I didn't even know him . . . And he was still bleeding then. He taken his shirt off and I taken his shirt and squeezed the shirt and blood was running down out of the shirt — streaming out of the shirt. Well you know, then he went to the doctor. It was several gashes in his head . . . the doctor was washing the wound and clipping his hair where he could, you know, dress the place — Bob fell out, went out. He just passed out." *Id.* at 1493. In conclusion the resident stated, "You know, such things like that, why, that's why the Negroes in Amite County is afraid to go down to register . . . Everyone I have talked to at my meetings, they said they wanted to register, but they were afraid to go down to register." *Id.* "So that's a minimum of seven killings — that is, we think — that occurred in the three counties, Amite County, Wilkerson County and Franklin County, in a space of around six months, all embedded in this contention of cross burnings and the whippings and the appearance of people in the street with hoods and this new Society for the Preservation of the White Race . . ." *Id.* at 1605.

A Greenville resident active in voter registration and the Freedom Democratic Party recounted his arrest in Winona: "Before I was elected chairman of the executive committee of the Freedom Democratic Party, I was working on voter registration with the Student Nonviolent Coordinating Committee. On June 9, 1963, I was arrested. Mrs. Fanny Lou Hamer, Rosemary Clark and three other individuals were arrested on their way back from a workshop . . . conducted . . . to instruct students how to conduct voter registration activities and political rallies. They stopped in Winona at which time they were arrested by members of the highway patrol, beaten . . . I called to attempt to find out the bond and charges, at which time the individual who answered the phone and identified himself as the sheriff . . . asked me if I was calling about 'those niggers who had been arrested at the bus station' . . . And he said if I was really interested in finding out . . . I should go down there . . . So I left Greenwood and went to Winona . . . I was told that there was no bond and that they would not be allowed to have visitors, at which time I left. I attempted to walk back to the car . . . I was then asked by the sheriff and . . . [the highway patrolman] whether I was a member of that thing in Greenwood; and I said I didn't know what he was talking about. I didn't answer. He hit me in the mouth and knocked me into the street. I got up and the sheriff said 'This nigger is getting unruly.' At that time I was arrested for disturbing the peace, [and] resisting arrest . . . . At this time I was again subjected to a lot of questions. A piece of paper was found in my pocket which had been given to me the night before and which had written on the end of it, "Killed in a car" at which time I was charged with murder . . . . I was beaten for four hours by members of the highway patrol, by members of the local police, the sheriff and the mayor of Winona. I was punched, kicked. One individual was playing with a long knife and said: 'We should castrate all of you black bastards and that might begin to solve some of the problems.' And another was playing with a gun behind my head and he ity had occurred.[264] Local law enforcement officers played an important role in harassing voting rights workers.[265] A frequent occurrence was the burning of crosses or the throwing of bombs at the homes of persons who had permitted voting rights workers to stay with them.[266] Economic discrimination was rampant and

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kept moving it across the back of my head and at the same time I was pushed against the wall by two of them and punched repeatedly in the chest and stomach by a member of the highway patrol . . . . After this beating which involved thrusting a piece of lit paper in the area of my genitals, there was an attempt to get me to answer questions that I had actually committed that murder of those two individuals whom I did not know and did not know had been murdered . . . . I was transferred back and forth from the Montgomery County courthouse [to] Carroll County courthouse and jail. *Id.* at 1772-74.

[264] *See, e.g., Deps.* at 9. A gas bomb was thrown at the Aberdeen COFO house at 11:30 one night. *Id.* People were inside talking when the bomb exploded outside; the police were called and arrived five hours later. *Id.* The Antioch Church regularly used for voter registration meetings was burned the same night Fannie Lou Hamer spoke there. The sheriff's response was, "Probably if they hadn't been out there, your church wouldn't have been burned." *Id.* at 274. A resident of Walthall County testified that "in our community we have had a cross burnt on our churchyard." *Id.* at 1645. According to the March 4, 1965, Clarion Ledger, a cross was burned in Greenville. "Authorities reported no new leads Tuesday in their investigation of a cross that burned here Monday night . . . It was the first cross burning in 11 months. In April 1964 a statewide cross burning saw a blazing cross in the city . . . ." *Id.* at 1667. When a deponent was asked about bombs in her area, she described the effect on the community: "Well, I heard one in July and I heard one at the Freedom House that went off in the morning around 4 o'clock, and I heard one at the Burgland Supermarket. And all through the night we were afraid to sleep sound; it seemed like we were afraid to go to sleep. You could heard [sic] these bombs go off and you didn't know who was killed or what had happened. The telephone would ring and people would start going into the street, you know, to see who was killed or whatever had happened." *Id.* at 1264. The Natchez SNCC office was bombed in August 1964. At the scene of the bombing one SNCC worker found out the bomb was meant for the house in which the civil rights workers lived, not the office next door. *Id.* at 1152-53. Also, a policeman said to the SNCC workers, "I am surprised you haven't been killed before now. We have been holding them off of you." *Id.* at 1153.

[265] *See, e.g., Deps.* at 51. Police threatened the arrest of an individual if they ever caught the person again with civil rights workers. *Id.* After a voter education project meeting in Clarksdale, some participants were arrested on the charge of loitering, although many were in moving cars on their way out of town. *Id.* at 492. A voter registration worker taken to city hall was asked, "What the hell are you doing here? Where are you from? Why are you causing trouble here? Why don't you go back to where you came from?" Very shortly after their release by the police, the person was given a ticket by the very same police for illegally backing up. *Id.* at 663. In Tallahatchie County, the wife of an active member of the Freedom Democratic Party was told by a city officer that her husband would have to leave town. *Id.* at 999.

[266] *See Deps.* at 776. A resident of Sunflower County who had been active in voter registration and other civil rights activities had a cross burned at his house. *Id.* A resi-

included such tactics as the firing of blacks who registered or the choking off of supplies tò black businesses.[267] At the registration

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dent of Batesville allowed civil rights workers to stay in his house even after a neighbor related a message from the sheriff telling him to get "those white civil rights workers" out. *Id.* at 896. He received threatening phone calls and ultimately a tear gas bomb was thrown at his house. *Id.* at 875. A Pike County resident testified to the bombings in McComb: "Well, I felt they had people they were picking out in the community they were bombing . . . ." *Id.* at 1557-58. A resident of McComb told why she had not registered to vote: "Well, there had been a number of cross burnings, as a matter of fact, one in Whitistown Church, bombings and people that had been involved in voter registration." *Id.* at 1533. The president of the Amite County NAACP was asked if he had knowledge of any crosses being burned; he answered,"Yes . . . one was burned right out in front of my house. Then, one was burned at the church, the same night . . . [and] it was a number of more crosses that were burned the same night . . . up in the upper edge of the county." *Id.* at 1491-93. A farmer in Amite County recounted threats passed along the grapevine: "I had two colored fellows had told me that a white man told them they had had a meeting and when the students come in, if any of the Negroes let them stay in their home, they were going to be bumped or burned out." *Id.* at 1515.

[267] *See, e.g., Deps.* at 46. An Aberdeen resident testified that she lost her job as a maid after her employer found out she had taken people to the courthouse to register. *Id.* A woodcutter from Webster County lost his job after going to Washington, D.C., in connection with the Mississippi Freedom Democratic Party challenge. His employer sent word that "He didn't work no freedom riders." *Id.* at 67. A public school bus driver in Holmes County was fired because of his membership in the NAACP. *Id.* at 122. A resident of Shaw told her employer, "Well, I work for the movement and I'm not afraid of it or ashamed of it." Thereafter she was no longer needed as a maid. *Id.* at 648. A black cafe owner was requested to close her cafe by her white landlord because he feared it would be bombed. *Id.* at 1268. The cafe was frequented by civil rights workers. *Id.* at 1267. Also, the police often "raid[ed] the place." *Id.* Later, the cafe owner's house was bombed and her landlord made her not only close the cafe but also move out of the house she rented from him. A Canton grocery owner rented a house to civil rights workers. Eventually it became a Freedom House and the black businessman became very active in voter registration work. *Id.* at 1871. One night at a mass meeting he spoke on the importance of registering to vote. *Id.* The next day he was arrested for "burning trash on city property." *Id.* at 1872. He had in fact done so for the last 13 years (ever since the store opened) with the approval of the city sanitation department. *Id.* His trial was postponed because "some .. city officials wanted to have a meeting with [him]." *Id.* at 1873. The meeting took place between the black businessman and four of the city's leading white citizens at the First National Bank. *Id.* They wanted him to get those "agitators" out of his house and the fine would be dropped. *Id.* at 1894. Furthermore, if the civil rights workers stayed in his house, he would lose his gas pumps. *Id.* In the end, the witness refused to be coerced by the whites although white wholesalers refused to sell him grocery supplies, poultry and meat, and local truckers refused to deliver for fear of being bombed. *Id.* at 1875. He was forced to drive 25 miles to Jackson in his own car to get supplies for his store. *Id.* A restaurant owner and insurance salesman become involved, along with his wife, in a voter registration campaign; they housed civil rights workers and served them at the cafe. *Id.* at 2228. "[A] piece of concrete block was thrown through the [cafe] window there, and two or three shots were fired, supposedly intended

offices, the range of devices to prevent blacks from registering was wide and varied. Long waits, so that blacks would have to make several trips to the registrar's office, were the norm.[268] Commonly, registrars refused to advise for thirty days whether the registrant had passed the "constitution interpretation" test.[269] The presence of police and other law enforcement officers at the registration office with arms and sometimes police dogs were among the methods used to render registration a difficult

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to be fired through the window, it hit the outside of the house instead." *Id.* A resident of Amite County who tried to register to vote lost a part-time job he had held for seven years: "He gave me a check and told me that was all, couldn't use me." *Id.* at 1504.

[268] *See, e.g.*, *Deps.* at 123-24. Fourteen residents of Holmes County arrived at the courthouse in Lexington between 9 and 10 a.m. Two were allowed in to register. The others were made to wait outside under a tree all day and never permitted to register. *Id.* A resident of Walthall County tried to register to vote but the registrar at first would not attend to him. "He told me he'd be with me after a while, but he — he always was so busy and that he never did get around to me." *Id.* at 1651. He was later allowed to take the test but was failed. *Id.* at 1652. In Meridian one potential registrant waited from 9 a.m. until 3 p.m. Because of his arthritis he could not stand any longer and had to go home. *Id.* at 1837. Out of the 50 people who had come to register, only five or six were registered. *Id.* On the same day, other residents of Meridian were kept waiting for shorter periods of time, but as one woman put it, "I stayed there about two hours. I have a 7-month-old baby, so I couldn't stay any longer." *Id.* at 1840. *See also Deps.* at 1832 and 1833 (for other two-hour waits). Another deponent had a similar experience in Meridian. He arrived "at about 10 or 10:30" and waited "until after 5 o'clock." *Id.* at 1842. He did not get to register. *Id.* In Madison County a resident of Camden went to register at the courthouse at 10 a.m. She remained there until 4:30, standing outside "up against the fence." *Id.* at 2172. The deponent made four trips in total and was still not registered although she took the test twice. *Id.* at 2173. A Hattiesburg resident who had completed the eleventh grade in an all-black public school was never taught about the right to vote until the Freedom School opened. *Id.* at 2229. At the time of the depositions she had been to the registrar's office ten times to register; she gave the following description of the way she was treated: "I feel like you're not wanted just because you're Negro, they don't want to serve you no way. Something like — you're a dog or something or other. You don't want to go into no place where people just stare at you like you're a dog or something." *Id.* at 2230. A black Mississippian who worked for COFO described going to the courthouse in January with a group of people. The blacks were stopped by the police and asked for their ID cards. *Id.* at 2233. They then had to seek admittance to the courthouse one at a time while the rest waited outside in the cold and the rain. *Id.* at 2234.

[269] *See Deps.* at 692-93. A resident of Greenwood went five times to register to vote. *Id.* The first four times he filled out a form and had to wait thirty days. *Id.* On the fifth attempt the registrar said, "What are you coming in here for? You know that you can't read and write and you can't pass. You ought to be on the job." *Id.* at 693. The 61-year-old black man stood before the white female circuit clerk and then turned around and walked out. *Id.*

and frightening procedure.[270] Arrests for "parading without a permit" of groups of blacks who came together to register was another frequently employed device.[271]

It is impossible to read the depositions without realizing that registration by blacks and assistance in that process by voting rights workers was a dangerous undertaking; local police officers were commonly part of the danger; and these circumstances pervaded the state. It is also clear that it took enormous courage for many of the witnesses to agree to testify.[272]

Perhaps the witnesses felt some sense of security from the outward calm and formality that pervaded the depositions. But they knew that in a short time the lawyers would be gone and they would have to face the violence and terrorism with which they were all familiar.

The adverse witnesses consistently denied that there was anything amiss with respect to the electoral processes of the state. Their presentation is epitomized by ex-governor Ross Barnett's statement: "I don't know of a single Negro who has been discriminated against — not a one."[273]

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[270] *See Deps.* at 19. Black citizens going to the courthouse in Monroe noted big dogs being walked in the vicinity of the registrar's office. *Id.* Policemen were pacing the hallway of the courthouse partially lifting their guns. *Id.* at 22. White city employees were standing near the circuit clerk's office cracking a whip, while policemen took pictures of registrants standing outside the clerk's office. *Id.* at 29, 46. In Holmes County, a deponent observed the sheriff with a big dog and "as two colored ladies passed . . . it looked as if it were going to attack them . . . and then as a white lady passed, . . . [the owner] wrapped his hand up in the chain and pulled the dog back in." *Id.* at 265. In DeSoto County, the blacks were ordered out of the courthouse and followed out by a policeman with a dog. *Id.* at 589. A 70-year old woman from Palmer's Crossing picketed the courthouse of Forrest County and was arrested. At the jailhouse they took her coat and purse. She "asked them to give me my coat, I'm sick and under a doctor, and I'm cold and will you give me my coat please?" *Id.* at 2242. The police officer said, "I'll give you these [indicating a big gun] if you say anything more." *Id.* Residents of Pike County went to register to vote. Upon their arriving at the courthouse, the sheriff told them to leave because the registrar was in court and therefore they could not register. *Id.* at 1264. Two blacks refused to leave and were placed under arrest for trespassing. *Id.* They were photographed, fingerprinted, and placed in a cell. After being released on $100 bail, one of them returned the next day to register and was again arrested for trespassing. *Id.* at 1265. The deponent testified, "As they took me into the cell, in jail before they put me in the cell, [the highway patrolman] said 'She was just here yesterday and we are not going to take her fingerprints.' After that, two highway patrol pushed me in this room and they closed this door on my arm, and I begin to scream and ask them to let go of my arm." *Id.* She had to receive medical treatment for her arm. *Id.* at 1282.

[271] *See, e.g., Deps.* at 461. A group of registrants was arrested for parading without a permit; "[the policeman] said for us to come in and he weighed us and taken our name and put us in jail." *Id.*

[272] *See* The Delta Democrat Times, Feb. 7, 1965, at G2, col. 4.

The typed depositions were all compiled and presented to the Clerk of the House of Representatives with a request by the contestants that they be printed and made available to members of the House.[274] There then ensued a dispute before the clerk as to whether he should print the depositions, with the contestees opposing the printing.[275] The dispute evoked extensive political pressures from members of the House. It soon became evident that the constituency supporting the release of the facts to members of the House was too strong to overcome. The clerk finally agreed to print the depositions, and they appear as three volumes totaling almost three thousand pages in fine print.[276]

The contestants then prepared a major brief of 117 printed pages (with a 99-page appendix) which was presented to the House Administrative Committee and to each member of the House. The brief set out the factual and legal arguments in support of the contest. It also included a detailed summary, district by district, of what had been revealed in the depositions.[277] In addition, the brief assembled all other material that was available with respect to each of the congressional districts.[278] The brief and the depositions may be the most comprehensive compendium of data yet assembled respecting the obstacles then being placed upon the ability of blacks to vote throughout Mississippi.

The brief also eliminated an issue which had caused controversy. As originally presented, the challenge argued that at least the three contestants who had sought to get on the ballot should be declared elected by reason of the mock election which was more democratic than the regular election.[279] In the brief, it was conceded that "the most appropriate form of relief in these cases under all the circumstances would be the vacating of the elections and the ordering of new congressional elections under circumstances which would guarantee the full, fair, and free participation of Negro citizens in such elections."[280]

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[273] *Deps.* at 2883.

[274] 111 CONG. REC. at 14, 163-66.

[275] *Id.* at 164.

[276] The document is entitled *Printed for Information of the Committee on House Administration — Papers Omitted in Printing Pursuant to Provisions of the Statutes Involving the Five Congressional Districts in the State of Mississippi, 89th Congress.* The clerk used this formulation since his position was that he was *not* formally printing the documents because of technical defects. Copies of the depositions and the brief submitted by the contestants have been deposited in the library of the University of Mississippi Law School.

[277] *See Brief of Contestants* at Appendix A.

[278] *Id.*

On September 13 and 14, 1965, the contestants appeared before a closed meeting of the Subcommittee on Elections of the House Administrative Committee.[281] The sole argument presented by the contestees was that the contestants had no standing, because they had not been candidates in the election.[282] At the time, the argument had little basis. It is familiar law that the House may consider contests not only from a rival candidate but also from electors in the district or on motion of any member of the House.[283] The contestees relied heavily on a decision of Congress at the opening of the then current session, dismissing a contest against Richard Ottinger brought by the campaign manager of his defeated rival.[284] However, the only issue decided in the *Ottinger* case was the availability of the deposition procedure to the *Ottinger* contestant — an issue that was moot in the Mississippi case since the contestees had participated in that process.[285] Moreover, in the Mississippi case there was evidence that three contestants had in fact sought to participate in the election but had been unlawfully denied that opportunity.[286] The House Administration Committee wanted only to consider whether to recommend dismissal, not the merits of the challenge. Nevertheless, each of the contestants briefly addressed the committee. Fannie Lou Hamer eloquently put forth what she believed was at issue. After recounting an instance where only two weeks before a man "who has been seen around the MFDP" was "brutally murdered in his home," she said:

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[279] *Id.* at 8; *Contested Elections Hearings*, *supra* note 216, at 135.

[280] *Id.* at 3. One of the vociferous critics of the MFDP's original position on this issue was Joseph Rauh who had represented the MFDP in the Atlantic City Democratic Party challenge and who broke with MFDP after it refused to accept the compromise offered by President Johnson. *See* Rovere, *supra* note 121.

[281] *Contested Elections Hearings*, *supra* note 216, at 24. Over the objection of the contestants, the committee decided to proceed in closed hearings and limited the subject matter of the hearings to a motion to dismiss. *Id.*

It is clear that the committee hearings came about because on August 25, 1965, Congressman Ryan, on behalf of himself and thirty others, had given notice that if the House Administrative Committee did not report on the Mississippi Challenge by September 21, he would move to discharge the committee from further consideration of the matter and place the entire matter directly before the House. 111 CONG. REC. 21821 (1965).

[282] *Contested Elections Hearings*, *supra* note 216, at 24.

[283] *See, e.g.*, Sundry Electors v. Key, 1 HINDS 432 p. 417, C.&H. 224, Rowell's Digest 58 (Md. 1806)(challenge filed by voters in district, considered on merits by House); Sundry Electors v. Bailey, 1 HINDS § 434 p. 419, C.&H. 411, Rowell's Digest 80, 18th Cong. 1st Sess. (Mass. 1824(petition challenging sitting Member filed by 17 citizens of the State, considered on merits by House, seat vacated); Case of Joseph Bradley Varnum, 1 HINDS § 763 p. 987, C.&H. 112, Rowell's Digest 47, 47th Cong. 1st Sess. (Mass. 1796)(memorial by sundry citizens and electors); John Swanwick's case, C.&H. 112, Rowell's Digest 46, 46th Cong. (Pa. 1796)(petition of sundry electors); Tennessee Cases, 1 HINDS § 521 p. 648, Smith 3, Rowell's Digest 261, 42nd Cong. 1st Sess. (Tenn. 1871)(petition by citizens); Bayley v. Barbour, 1 HINDS § 435 p. 422, 2 Ells. 676, Rowell's Digest 3984, 47th Cong. 1st Sess. (Va. 1882)(contestant did not claim seat).

> This is the price that we pay in the State of Mississippi for just wanting to have a chance, as American citizens, to exercise our constitutional right that we were insured by the fifteenth amendment.
>
> By sweeping this challenge under the rug now and dismissing this challenge, I think it would be wrong for the whole country because it is time for the American people to wake up. All we want is a chance to participate in the government of Mississippi, and [we have] all of the violence, all of the bombings, all of the people that have been murdered in Mississippi because they wanted to vote . . .
>
> I am not saying that Mr. Whitten or the other Congressmen helps in that, but I am saying that they knew this is going on and as long as they have let it happen — some have been in office 30-some years and never even bothered to run because they didn't have nobody to oppose them. But when we tried we

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[284] 111 CONG. REC. at 20 (1965). 111 CONG. REC. at 24,263.

[285] *Id.* at 952-57. *See also Contested Elections Hearings, supra* note 216, at 70-72 (Ottinger case explained as well as its inapplicability to Mississippi case). The legal arguments were presented before the House Committee by the author of this article and Prof. Kinoy. *Id.* at 63-77.

[286] *Deps.* at 2379-97 (Secretary of State testifies to duties on State Board of Election, ballot requirements, and his rejection of three candidates' petitions to be on ballot). *See also Brief of Contestants* at 8.

> have been treated like criminals and convicts. It is time for the American people in this country to wake up.
>
> I might not live two hours after I get back home, but I want to be a part of helping set the Negro free in Mississippi.[287]

Under date of September 15, 1965, the majority of the committee made its report to the House in which it recommended dismissal of the contests.[288] There was a vigorous dissent.[289] The committee's report is somewhat defensive but emphasizes that in view of the enactment of the Voting Rights Act, which became law on August 6, 1965, the issues in the Mississippi contest were moot as to future elections.[290]

By the spring of 1965, the national constituency for finally undoing the long history of black disfranchisement was overwhelming. The Selma to Montgomery march led by the Reverend Martin Luther King, Jr. occurred in March, 1965 and achieved tremendous nationwide support. The march was through the so-called Black Belt of Alabama, ten counties where blacks were a majority of the population, or close to that, but were effectively prevented from voting.[291] The marchers were beaten by the police at the Edmund Pettus Bridge in Selma, and the television images of that brutality had a tremendous impact.[292] The drive for the enactment of the law was punctuated by a moving speech by President Lyndon Johnson, a Southerner, to a joint session of Congress which included the poignant phrase of the black civil rights movement, "We shall overcome."[293] The Voting Rights Act of 1965 included a whole package of provisions designed finally to put an end to black disfranchisement.[294]

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[287] *Contested Elections Hearings*, *supra* note 216, at 62.

[288] H.R. REP. No. 383, 89th Cong., 1st Sess. 5 (1965); 111 CONG. REC. 24,263 1965).

[289] H.R. REP. No. 1008, 89th Cong., 1st Sess. (1965).

[290] H.R. REP. No. 383, *supra* note 288. *See also* 111 CONG. REC. 24,277-78 (statement of Rep. McCulloch).

[291] 111 CONG. REC. 4350-51; *see also id.* at 4504-5 (reprint of news articles).

[292] *Id.* at 4562-63. Rep. Morse from Massachusetts exemplified the outrage:

> As I watched the television screen last night and saw Negro women beaten to the ground; when I observed the nature of the blows that were struck on the heads and the bodies of Negroes by white, bigoted racist policemen, I shuddered to think that could come to pass in any state of my country in the year 1965.

Id. at 4563.

On September 17, the report of the committee was debated on the floor of the House.[295] Consistent with precedent, the three women who led the MFDP, Fannie Lou Hamer, Annie Devine and Victoria Gray, were invited to sit on the floor of the House.[296] Again, hundreds of persons from Mississippi and their supporters were in evidence, making clear their support of the challenge.[297] The debate showed the deep concern of the members of the House as to the underlying issues. It was also clear from the debate that the members were impressed by the suggestion of the committee that the main issues were being rendered moot as to the future by the Voting Rights Act of 1965 which had become law a month before the vote.[298] Despite this point, the debate was very extensive and a number of eloquent and impassioned speeches were made objecting to the cavalier way in which the committee had dealt with the contest.[299] Many members supported a vote to re-commit to the committee with a directive to deal with and report on the merits.[300] Rep. Roosevelt from California rose in support of the motion to recommit and argued as follows:

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[293] 111 CONG. REC. 5061 (1965). "Tom Wicker of the *Times* wrote Lyndon Johnson took the rallying cry of American Negroes into Congress and American homes tonight by pledging that 'we shall overcome' what he called 'a crippling legacy of bigotry and injustice'." D. GARROW, *supra* note 136 at 106.

[294] In South Carolina v. Katzenbach, 383 U.S. 301, 337 (1966), the Supreme Court sustained the constitutionality of the Voting Rights Act of 1965. The opinion includes an excellent review of the history of disfranchisement of blacks as well as the failure of various remedies which Congress had earlier adopted. Particular reference is made to the ineffectiveness of piecemeal litigation. The essential features of the Act as described by the court were (a) the suspension of literacy tests or other 'tests or devices" for five years from the last occurrence of substantial voting discrimination; detailed provisions for determining the areas to which it is applicable and methods of establishing that the area has been free of discrimination for five years; (b) the suspension of all changes of voting regulations pending review to determine whether the changes will abridge the franchise on racial grounds; (c) the appointment, on certification of the attorney general, of federal examiners and poll watchers to assure the registration and ability to vote of all qualified persons; and (d) a broad prohibition, applicable to all areas of the country, of the use of voting rules to abridge exercise of the franchise on racial grounds. *Id.* at 319-28.

The differences between the Voting Rights Act of 1965 and the previous Voting Rights Acts of 1957, 1960, and 1964 are fundamental. The earlier statutes sought to strengthen litigation remedies to enforce an 1870 generalized prohibition of racial discrimination in voting. Those statutes were the vehicle for the Justice Department's litigation program. The 1965 statute simply outlawed the major devices that had been employed to prevent blacks from voting, such as tests of literacy, understanding of the constitution, good character, etc., and set up a system to monitor changes in existing voting regulations.

[295] 111 CONG. REC. 24,263-92 (1965).

[296] *Id.* at 24,268.

[297] Clarion Ledger, Sept. 17, 1965, at 1, col. 1 "[S]ome 300 civil rights demonstrators, mostly Freedom Party members brought here by bus from Mississippi descended on the capitol and staged a 'silent vigil'." *Id.*

> The record in the Mississippi contested election cases of 1965 bring before the House overwhelming evidence of the simple stark facts upon which these cases rest - the almost total, systematic, and deliberate exclusion of the Negro citizens of Mississippi from the electoral process of that State . . . The unim-

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[298] 111 Cong. Rec. at 24,264. *But see* 111 Cong. Rec. at 24,266 (prepared speech entered by Curtis).

> [O]n page 2, item 5 and page 4, . . . the report says that the contestant's contention that Negroes have been systematically excluded from registering and voting in the State of Mississippi "even if true" is now a moot question in that Congress has now passed the 1965 Voting Rights Act. How can such discrimination be called moot when the 1964 election is now history and the 1965 Voting Rights Act will and can have no bearing on the constitutionality of any given 1964 election contest and the right of any present Member to sit?

Id.

[299] *Id.* at 24,266-67.

[300] 111 Cong. Rec. 24,267 (1965). The challengers had no help whatever from the Johnson Administration. Indeed, some of those forces who, at the Atlantic City convention, had pressured the MFDP to accept President Johnson's compromise on the delegation, attempted to discourage Martin Luther King, Jr. from supporting the challenge in Congress. His telegram of support, read into the record during the debate confirmed the broad support in the civil rights community for the challenge. *Id.* Drew Pearson reported that House Speaker McCormack had made a secret deal with the Mississippi congressmen:

> It will probably be denied but gaunt gray Speaker John McCormack of Massachusetts has made a secret deal with Mississippi Congressmen to help them remain in Congress. Without his help they would probably be ousted . . . . Backstage Move No. 1 . . . Speaker McCormack led the move to seat them . . . Backstage Move No. 2.
>
> [Although Congressman John Bell Williams had been stripped of seniority for supporting Goldwater, Speaker McCormack] gave Williams full seniority in assigning office space . . . Backstage Move No. 3 . . . McCormack has told Mississippi Congressmen that they would lose a showdown vote to keep their seats. Their only hope, he has advised, is to sidetrack the move to unseat them. And he has promised to use his own tremendous power to do so.

The Washington Merry-Go-Round, Washington Post, May 20, 1965, F15, col. 5.

> peachable facts of wholesale Negro disenfranchisement make a mockery out of the constitutional requirement that the Members of this House be chosen "by the people of the several states . . . The only question remaining is whether the House of Representatives of the United States will tolerate elections from Members of the House conducted under unconstitutional laws . . ."[301]

Rep. Ryan succinctly put the issue on whether or not to recommit: "The contestants who have challenged the Mississippi elections have used the most orderly devices known to our society. They have used depositions, petitions, affidavits, briefs, and every procedure provided by the law. Are they now to be denied justice?"[302] Speaking against the majority report, he said:

> The majority report of the House Administration Committee is unfortunate to say the least.
>
> After only a three-hour subcommittee hearing closed even to committee members, the committee reported on the merits of this case. The contestants were given a chance to testify, but only as to the question of standing. Despite its stated dedication to due process and its "concern that either outright dismissal of the challenge or unseating of the present Mississippi delegation would violate this precept," the committee has ruled on the substance without permitting contestants to speak on the merits.[303]

Some members of the House vented their anger at the committee's having given the challenge short shrift.[304] It did not give the contestants "a full and complete hearing."[305] A motion to recommit to the committee was lost 129 to 207.[306]

In order to resolve doubts in the minds of some of the members, the majority leader offered an amendment to the resolution, the effect of which was to support the committee's recommendation that the contest should be dismissed and to eliminate a clause to the effect that the members from Mississippi "are entitled to their seats as representatives of said districts and state."[307] This amendment would mollify the concerns of some of the members who had protested that there was no hearing on the merits. In the end, the vote was to support the committee by a vote of 228 to 143 with fifty-one members not voting and ten responding "present."[308] Thus, the challenge received the support of almost 40 percent of all members of Congress who voted.

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[301] 111 Cong. Rec. 24,265 (1965).

[302] *Id.* at 24,269.

[303] *Id.* at 24,268. *See generally* 111 Cong. Rec. 24,263-91 (1965)(House debate whether to dismiss or recommit).

[304] *Id.*

[305] 111 Cong. Rec. at 24,283.

[306] *Id.* at 24,291.

Participants in the challenge have argued, with some merit, that it contributed substantially to subsequent developments in respect to the enforcement of the Voting Rights Act. Only some ten years previously, the enforcement of the Supreme Court's decision in *Brown v. Board of Education* had been obstructed by massive resistance.[309] Nothing like that occurred in respect to enforcement of those provisions of the Voting Rights Act that assured the simple right to vote. This is not to suggest that there was not a great deal of litigation as to the details of the implementation of that statute, but there was no obstruction of the elemental right to vote of the type that had greeted *Brown.* It may well be that the challenge, which received substantial support, effectively reminded southern leadership of the broad power of the House to deny representation. In the course of the debate, those who referred to the enactment of the Voting Rights Act as justifying dismissal of the challenge pointedly warned that if obstruction of voting continued to occur there might be a different view of the matter.[310]

With the enactment of the Voting Rights Act of 1965, the courts were quick to recognize that the situation had changed and yet, there was a long way to go. In *Mississippi Freedom Democratic Party v. Democratic Party of the State of Mississippi,*[311] the MFDP sought to delay the primary election scheduled for June 7, 1966, on the ground that since the Voting Rights Act had become effective only on August 6, 1965, there had not been sufficient time for blacks to register.[312] With full recognition of the history of past voting restrictions, the court denied any delay of the election upon a variety of practical considerations.[313] The court's concluding and prescient sentences bear repetition:

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[307] *Id.* at 24,290.

[308] *Id.* at 24,291.

[309] *See supra* notes 94-98 and accompanying text.

[310] 111 CONG. REC. 24,403 (1965).

[311] 362 F.2d 60 (5th Cir. 1966).

> The tight grip of a long dead hand is hard to break. More than one summer may pass before that grip is broken and the effect of its clasp on the present completely undone.[314]

V. THE SEQUEL[315]

The experiences of the MFDP in Atlantic City and in the challenge had lasting impact. Out of them grew a powerful independent political movement of black voters in Mississippi, fully attuned to the use of political and legal means in their struggle for black voting rights. The MFDP cherished, above all else, its independence. While, as Atlantic City showed, the MFDP was willing to work for a role in one of the existing national political parties, the events in Atlantic City also demonstrated that the organization was not controlled by the established leadership of that party. Thereafter, the MFDP pressed the election of candidates, both independent and Democratic, for state and local offices.[316] The experience of the congressional challenge showed that insofar as legal resources were required, they were available without recourse to the government.

The pendency and ultimate defeat of the challenge did not in any way dissuade the MFDP from the employment of additional legal-political techniques; in fact, it seems to have spurred a determination to continued challenging in whatever forums were appropriate. In April, 1965, Mrs. Hamer brought suit to delay elections in several municipalities in Sunflower County to allow time for blacks to register in accordance with the court decree finding that blacks had been barred from registering.[317] Mrs. Hamer was not able to delay the election but ultimately the court of appeals set aside the election held in the town of Sunflower, which had a population of approximately 900 people.[318] In October, 1965, one month after the House rejected the challenge, the MFDP, focusing on the second congressional district, filed a lawsuit questioning the constitutionality of the Mississippi congressional district lines on the grounds of gross disparities in population in the different districts.[319]

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[312] *Id.* at 61.

[313] *Id.*

[314] *Id.* at 63.

[315] The author wishes to express his gratitude to Frank Parker, of the Lawyers Committee for Civil Rights Under Law, for permission to examine his manuscript of a soon-to-be published book which deals in great detail with the post-1965 litigation efforts to achieve voting rights for blacks in Mississippi.

[316] J. McDOWELL & M. LOVENTHAL, BLACK POLITICS: A STUDY AND ANNOTATED BIBLIOGRAPHY OF THE MISSISSIPPI FREEDOM DEMOCRATIC PARTY 16 (1976).

The second district, at the time, had a sixty percent black majority[320] and a disparity of about forty percent against other districts.[321] The Legislature in early 1966 responded by equalizing the size of the district, but it carefully drew the new district lines so that the blacks would be distributed among the different districts in such fashion that no district would have a black majority sufficient to elect a black member of Congress.[322] The plaintiffs accordingly amended their suit to charge that the districting was racially motivated and discriminatory.[323] The case was heard by the three-judge court consisting of J.P. Coleman (who, as noted above, had been chief counsel for the contestees in the congressional challenge and had been appointed to the Court of Appeals for the Fifth Circuit by President Johnson while the challenge was still pending) and District Court Judges Cox and Russell.[324]

In language strikingly reminiscent of the sophistry employed in *Williams v. Mississippi*,[325] the Court ruled that the plaintiff had failed to prove a discriminatory purpose.[326] The Supreme Court affirmed without oral argument, Justice Douglas dissenting.[327]

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[317] Hamer v. Campbell, 358 F.2d 215 (5th Cir. 1966).

[318] *Id.* at 222.

[319] Conner v. Johnson, 279 F. Supp. 619 (S.D. Miss. 1966), *aff'd* 386 U.S. 483 (1967). As originally filed, the suit did not involve the Voting Rights Act but rather elemental principle of one person-one vote. *Id.*

[320] Connor v. Johnson, 279 F. Supp. at 624.

[321] *Id.*

[322] *Id.* at 621.

[323] *Id.* at 622.

[324] Judge Cox had a notorious record of antagonism toward blacks and Judge Russell had also shown considerable negativism. *See supra* note 136 and accompanying text.

[325] 170 U.S. 213 (1898); *see supra* notes 58-62 and accompanying text.

The actions of the Mississippi Legislature with respect to congressional redistricting were paralleled by massive legislative efforts to negate the impact of the Voting Rights Act of 1965 on elections for local offices. It was true, as noted above, that the blatant disfranchisement of the blacks for seventy-five years simply could not continue to stand.[328] But to say that disfranchisement was dealt its death blow did not mean that blacks thereafter were fully enfranchised. The struggles over black suffrage soon became struggles over whether blacks could vote *effectively* for members of Congress and state legislators as well as county and municipal governing bodies, boards of education, and other elected government officials. "Instead of preventing blacks from registering, the focus of discrimination shifted to preventing blacks from winning or deciding elections."[329]

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[326] Connor v. Johnson, 279 F.Supp. at 623-24. The record was replete with quotations from legislators acknowledging the discriminatory purpose of the redistricting. But all of these appeared in the press, which the Court held not to be probative even though the legislature kept no record of its debates and the newspapers were in fact the only record of what the legislators said.

In *Williams*, the Court acknowledged the discriminatory purpose but claimed that the facts of discrimination had not been proved. In *Connor*, the Court claimed the purpose had not been proved and did not seriously consider the factual consequences of the redistricting.

[327] Connor v. Johnson, 386 U.S. 483 (1967). The story of the continued legal struggle for redistricting the second congressional district is described in detail in PARKER, *The Mississippi Congressional Redistricting Case: A Case Study in Minority Vote Dilution*, 28 How. L.J. 397 (1985).

[328] The increase in voting by blacks since 1965 has been dramatic. In Mississippi the percentage of blacks registered to vote went from 6.7 percent in 1965 to 59.8 percent in 1967. Almost 250,000 blacks registered during that period; only 28,800 had been registered in 1965. *Political Participation: A Study of the Participation by Negroes in the Electoral and Political Process in 10 Southern States Since the Passage of the Voting Rights Act of 1965*, U.S. Comm. on Civil Rights (1968). In 1987, 54% of blacks in Mississippi were registered to vote. Mississippi State Chap. Operation PUSH v. Allain, 674 F.Supp. 1245, 1255 (N.D. Miss. 1987).

[329] Derfner, *supra* note 23, at 553. Analyzing the range of methods employed to overcome the fact that blacks were going to vote, Derfner notes that "the major forms of discrimination have fallen into three categories: vote dilution, barriers to gaining public office, and hindrances to black voters." In these broad categories the author lists a wide range of techniques of which the following are but a few: Racial gerrymandering, altering racial composition by annexing or de-annexing territory or consolidating political units,

Within ten months after enactment of the Voting Rights Act of 1965, the Mississippi Legislature adopted a multi-faceted program to limit the effectiveness of black voting. The legislative package included authorization to the board of supervisors of any county to shift to at-large county-wide elections instead of elections by separate districts within the county.[330] At-large voting is a device generally recognized as effecting the dilution of black voting strength since it submerges what might be a black majority in a particular locale into a broad county-wide district in which blacks are a minority. A similar device was authorized in respect to elections for local school boards.[331]

Shifting offices to the appointive rather than the elective process was another device, particularly employed with respect to superintendents of schools.[332] Another major device utilized to dilute black voting strength was racial gerrymandering within counties.[333]

Another bill imposed overwhelming restrictions and obstacles on the process of seeking to run as an independent, a matter of particular importance to the MFDP.[334] By way of example, the number of signatures required for an independent nominating petition was increased ten-fold.[335] These efforts were quite effective in preventing great numbers of newly registered blacks from having impact at the polls. In the 1967 elections, though large numbers of blacks voted, the number of blacks elected even to municipal and county offices was pitifully small.[336]

The task of blocking continuous legislative efforts to mini-

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requiring runoff elections, using at-large elections where black voting is concentrated in particular election districts, full slate or anti-single shot laws, numbered place laws, abolishing elective offices or making them appointive, and/or limiting the responsibilities of offices likely to be won by blacks. *Id.* at 553-58.

[330] Act of May 27, 1966, Ch. 290, § 1 (1966), Gen. Laws Miss. 374. *See also* Parker, *County Redistricting in Mississippi: Case Studies in Racial Gerrymandering*, 44 MISS. L.J. 391, 393 (1973).

[331] S.B. No. 1966, H.B. No. 275, H.B. No. 1974, H.B. No. 275, and H.B. No. 1074.

[332] H.B. No. 183.

[333] Parker, *supra* note 330, at 402-08.

[334] *See supra* note 221.

[335] H.B. No. 68 Miss. Laws 1966, ch. 13.

[336] Although black voters constituted 28 percent of the electorate, black candidates won only twenty-nine out of 4,700 elective offices, about one-half of one percent of the total.

mize the newly established rights of blacks to vote has been the focus of a great deal of litigation which is beyond the scope of this article. Briefly, it should be noted that in 1969 the Supreme Court of the United States in *Allen v. State Board of Electors*[337] gave full effect to section 5 of the Voting Rights Act of 1965, which required pre-clearance of voting rights changes even if they did not directly interfere with the right to register or vote, thus rejecting the restrictive interpretation urged by the states of Mississippi and Virginia.[338] The test was whether the change diluted the *effectiveness* of the black vote; therefore, the various restrictive devices described above were all required to be pre-cleared. As the Court stated: "the right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot."[339] The result was the striking down of the bevy of Mississippi laws adopted in 1966 and referred to above.

The *Allen* decision marked the beginning of a major turnaround in the opportunities for blacks to vote effectively. Two years later, the Supreme Court held that municipal annexations and moving polling places had to be pre-cleared.[340] The impact of these decisions is much enhanced by the provision of the 1965 Voting Rights Act approved by the Supreme Court to the effect that the burden of proving the lack of discriminatory impact of a change in the law is on the governing body seeking to make the change.[341]

The impact of section 5, as interpreted by the Supreme Court, has been enormous. Since 1969, the Justice Department has objected to approximately 2,000 voting law changes in the South covering a myriad of circumstances which diluted black voting strength.[342]

While giving strong effect to section 5 of the Voting Rights

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[337] 393 U.S. 544 (1969).

[338] *Id.* at 565.

[339] *Id.* at 569.

[340] Perkins v. Mathews, 400 U.S. 379 (1971).

[341] South Carolina v. Katzenbach, 383 U.S. 301, 335 (1966). "There was nothing inappropriate about. . . putting the burden of proof on the areas seeking relief." *Id.*

[342] U.S. Department of Justice, *Complete Listing of Objections Pursuant to Section 5 of the Voting Rights Act of 1965*, June 30, 1987.

Act, the Supreme Court faltered on the meaning of section 2 in *Mobile v. Bolden.*[343] The prompt nullification of that decision by the 1982 amendment of the Voting Rights Act was a reflection of the national constituency for rejecting the more subtle voting impediments of the post-1965 period just as firmly as Congress rejected the crude obstruction of voting rights in 1965.[344] In *Thornburg v. Gingles*,[345] a North Carolina case, the Supreme Court applied the new law, showing its sensitivity to subtle methods of dilution of black voting strength by multi-member districts.

Persistent litigation was required in Mississippi to overcome continuous legislative efforts to curb the possible impact of black voting on the composition of the state legislative body.[346] The local federal courts likewise continued to be obstructive.[347] Thus, litigation with respect to state legislative reapportionment commenced in 1965 and continued until 1976 when substantial relief was obtained in the Supreme Court through an unusual mandamus proceeding directed at the district three-judge court.[348] The essential problem was that the Mississippi Legislature sought to submerge black voting strength by the use of multi-member districts or by racial gerrymandering.[349] In this manner, an all-white legislature was sought to be maintained although the state population was more than thirty-five percent black.[350] It was not until 1979, after several interventions by the Supreme Court, that a plan for single member districts was effectuated following an order of the Court.[351] It took another decision of the Supreme Court to deal with the problem of racial gerrymandering of state legislative districts.[352]

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[343] 446 U.S. 55 (1980). Section 5 prohibits all changes in the electoral laws without pre-clearance. Section 2, however, is a general prohibition against discriminatory electoral laws and practices, whether or not they are the result of change.

[344] *See* H.R. RES. No. 227, 97th Cong. 1st Sess. (1982) (Voting Rights Act Extension).

[345] 478 U.S. 30 (1986).

[346] *Hearings, supra* note 34, at 493-548 (statement of Frank Parker, Director of Voting Rights Project of Lawyer's Comm. for Civil Rights Under Law).

[347] Connor v. Coleman, 425 U.S. 675 (1976). *See infra* note 351.

[348] *Hearings, supra* note 34, at 494 (statement of F. Parker).

[349] *Id.*

[350] *Id.* at 505.

[351] Connor v. Coleman, 425 U.S. 675 (1976). The district court decisions were in all cases by a three-judge court sitting the Southern District of Mississippi, composed of Circuit Court Judge J. P. Coleman and District Court Judges Cox and Russell. The Su-

Litigation under the Voting Rights Act has been massive and continuous and in recent years has moved into areas which would not have been imagined a few years ago, *e.g.* litigation concerning districts for the election of state court judges, both at the level of local courts and up to the Supreme Court of Mississippi.[353] There are hundreds of governmental units which are subject to provisions of the Voting Rights Act. The techniques which may be employed to achieve vote dilution are almost limitless and are frequently very subtle. Though the administrative actions of the Justice Department under section 5 have been of great importance, the Department, unlike its stance in the 1960s, has conducted relatively little litigation to enforce the Act.[354] Much of that litigation in Mississippi in the earlier days was conducted by a few dedicated lawyers associated with well-

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preme Court expressed its impatience with the long delays in the litigation as a result of these district court rulings: "Ten years of litigation have not yet resulted in a constitutionally apportioned Mississippi legislature." *Id.*

Some of the district court decisions in this long litigation are: Connor v. Johnson, 265 F. Supp. 492 (S.D. Miss. 1967); Connor v. Johnson, 330 F. Supp. 506 (S.D. Miss. 1971); Connor v. Waller, 396 F. Supp. 1308 (N.D. Miss. 1975); Connor v. Finch, 419 F. Supp. 1072, 419 F. Supp. 1089; 422 F. Supp. 1014 (S.D. Miss. 1976). Some of the Supreme Court decisions in this litigation were: Connor v. Johnson, 402 U.S. 690 (1971), *reh'g denied*, 403 U.S. 928 (1971); Connor v. Williams, 404 U.S. 549 (1972); Connor v. Waller, 421 U.S. 656 (1975); Connor v. Coleman, 425 U.S. 675 (1976).

[352] Connor v. Fitch, 431 U.S. 407 (1977).

[353] *See* Mississippi State Chap., Operation PUSH v. Allain, 674 F. Supp. 1245 (N.D. Miss. 1987)(dealing with dual registration requirements and prohibition of off-site registration); Kirksey v. Allain, 635 F. Supp. 347 (S.D. Miss. 1986)(holding that the Voting Rights Act applies to judicial elections); Martin v. Allain, 658 F. Supp. 1183 (S.D. Miss. 1987)(implementing *Kirksey*; dealing with redistricting in respect to election of chancery, circuit and county court judges). As of this writing this case has been resolved and elections are scheduled for June 1989, at which time it is anticipated a number of black judges will be elected. The court in Martin v. Allain expressly found that racially polarized voting was prevalent in Mississippi so that as a practical matter it is not to be anticipated that black judges would be elected except in areas where blacks are a significant majority. *Martin*, 658 F. Supp. at 1193. On the other hand, in a state with a 35% black population, no blacks could expect to be elected unless district lines were drawn so that significant pockets of blacks were not submerged by the majority white population. Sam McCray v. Miss. Board of Elections, No. 84-131 (N.D. Miss.)(challenge to election districting for Mississippi State Supreme Court). This case is awaiting trial.

[354] *See infra* note 355 and accompanying text.

known civil rights organizations.[355] In recent years, the litigation has been undertaken by a number of local black lawyers in private practice.[356]

VI. CONCLUSION

Slowly the combination of political organizing and litigation has had its effect in Mississippi. From 1967 to 1975, there was one black representative in the state legislative body. Now there are twenty-one. Mississippi has a black state Supreme Court justice and a black judge of the United States District Court, and is at the threshold of electing a number of other blacks to judicial office.

In January of 1987, Mike Espy was sworn in as Congressman from the second congressional district of Mississippi, the first black person to be elected to Congress to represent Mississippi since the Reconstruction period.

The heroes of the century of struggle for black political rights have included John Lynch, an ex-slave who spoke with extraordinary eloquence, and Fannie Lou Hamer, a sharecropper who moved the entire nation by her passionate plea for the political rights of the black people. They also included the innumerable and unheralded black citizens of Mississippi, who endured generations of disfranchisement but never lost their determination to exercise their political rights, and the hundreds of young people who came from all over the country to help in a great moral crusade to achieve some means of racial equality. Many lives were lost in this struggle. They were mostly black but in the civil rights movement of the 1960's, white people too were martyred as they joined their black colleagues in their struggle for freedom.

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[355] They included Alvin J. Bronstein and Armand Derfner of the Lawyers Constitutional Defense Committee, Frank Parker of the Lawyers Committee for Civil Rights Under Law, and somewhat later C. Victor McTeer and Margaret Carey of the Center for Constitutional Rights.

[356] There has been a dramatic increase in the number of black lawyers in the southern states. In Mississippi, the figure was three as of 1965; as of 1988 it is estimated that the number is 220. Martin v. Allain, 658 F. Supp. at 1203. The provisions for attorney fees in successful voter rights litigation, 42 U.S.C. § 1973 (1) (E); 42 U.S.C. § 1988), have aided in broadening the participation in voter rights litigation of members of the private bar unaffiliated with the various civil rights organizations.

Litigation has played an important role in this long battle. Critical to all significant legal action for voting rights has been the close integration of local community groups and the lawyers who have represented them — a legacy of the Mississippi challenge.[357]

The task of achieving full and fair political participation of blacks in Mississippi is far from completed, but it would be wrong to ignore the vast change that has occurred in the past twenty-five years. It is the hope that through the participation of blacks in the political process their social and economic problems will be addressed seriously, as indeed some state Reconstruction governments in their time attempted to do.

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[357] Reflecting this integration, the Center for Constitutional Rights in 1986 published a manual entitled *Litigation Under the Voting Rights Act of 1965* which was specifically directed to lawyers and local community groups. The manual was written by Armand Derfner, Laughlin McDonald (Director of the Southern Regional Office of the ACLU Foundation), and C. Victor McTeer. The author of this article served as editor of the manual.

APPENDIX A

L. A. ADRIAN
  California
THOMAS ADRIAN
  California
FRANK A. ANGLIN
  Illinois
EDWARD ARDZROONI, JR.
  California
SELMA ARNOLD
  New York
BEVERLY AXELROD
  California
WILLIAM T. BELCHER
  California
BENJAMIN BENDIT
  New Jersey
JACK BERMAN
  California
JOSEPH S. BERGER
  California
ARTHUR BERGGREN
  California
ROBERT BOEHM
  New York
MARTIN BRADLEY
  New York
RICHARD H. BREINER
  California
HARRIET BUHAI
  California
HAROLD CAMMER
  New York
ROBERT CARROW
  California
KIM CLARK
  California
DAVID COHEN
  Pennsylvania
JULIS COHEN
  New York
STEVEN J. COHN
  Massachusetts
EUGENE CRANE
  Illinois
GEORGE CROCKETT
  Michigan
EPHRIAM CROSS
  New York
EMERSON L. CRANELL
  New Jersey
ROBERT B. DELANY
  Michigan
ROBERT DELLA VALLE
  California
JAMES DONAL
  California
THOMAS DOYLE
  California
BENJAMIN DREYFUS
  California
JOHN J. DUFFY
  Pennsylvania
FRANK A. EVANS, JR.
  California
STANLEY FAULKNER
  New York
DOUGLAS FERGUSON
  California
THOMAS L. FIKE
  California
BERNARD J. FIEGER
  Michigan
DAVID B. FINKEL
  California
JOHN E. FITCH
  California
HERBERT FORER
  California
JOSEPH A. FORREST
  California
TERRY FRANCOIS
  California
ESTER STRUM FRANKEL
  New Jersey
JAY FRANKS
  Illinois
DAVID M. FREEDMAN
  New York
ROBERT GNAIZDA
  California
HERMAN B. GERRINGER
  New York
ALVIN H. GOLDSTEIN
  California
ROBERT GOODMAN
  New Jersey
JOSEPH R. GRODIN
  California
THELMA GREGORY
  New York
STUART GREENE
  New York
SAMUEL GRUBER
  Connecticut

JEREMIAH S. GUTMAN
New York
VINCENT HALLINAN
California
EDWIN C. HAMADA
Massachusetts
WILLIAM L. HIGGS
District of Columbia
PHILIP HIRSCHKOP
Virginia
NORMAN C. HOWARD
California
E. A. HUNTER, JR.
Illinois
ADOLPH IMMERMAN
New York
ROY JACKSON
Connecticut
MARTIN JACOBS
Pennsylvania
HASKELL KASSLER
Massachusetts
ALLAN KEMPLER
New Jersey
MILTON KOSS
New York
RICHARD KRANDLE
Michigan
JAMES W. LAMBERTON
New York
ANNA R. LANGFORD
Illinois
FRANKLIN T. LASKIN
California
ROBERT W. LENTZ
Pennsylvania
JACK G. LEVINE
California
HARRY LEVITAN
Pennsylvania
ROBERT Z. LEWIS
New York
HARRY LOHSTROH
California
JOE R. LOODINE
California
DAVID LUBELL
New York
JONATHAN LUBELL
New York
MALCOLM MACKILLOP
California
HUGH MANES
California
BEN MARGOLIS
California
EMANUEL MARGOLIS
California
CHARLES R. MARKELS
Illinois
GEORGE MARTINEZ
California
GEORGE MASCONE
California
ALISTER McALISTER
California
CARL McCORMICK
Illinois
JAMES E. McCREADY
California
JAMES T. McDONALD
California
JOHN McLAUGHLIN
California
IRVING MEYERS
Illinois
JOY MYERS
New York
HUGH B. MILLER
California
VERNON A. MOORE
California
STEVEN R. MORSE
Massachusetts
EDWARD MOSK
California
ISADORE NEEDLEMAN
New York
ALLEN NEIMAN
California
MAYNARD J. OMERBERG
California
WILLIAM T. PATRICK, JR.
Michigan
FRANK S. PESTANA
California
FRANK E. PHILLIPS
California
WILLIAM G. PHOENIX
California
ROBERT PLATH
California
ALEXANDER POLIKOFF
Illinois
JAMES P. PREOVOLES
California
VICTOR RABINOWITZ
New York

GEORGE NIMS RAYBIN
New York
LELAND H. RAYSON
Illinois
FRED REINHEIMER
California
RONALD REOSTI
Michigan
CATHERINE G. RORABACK
Connecticut
BARNEY ROSENSTEIN
New York
WILLIAM ROSSMORE
New Jersey
WARREN SALTZMAN
California
HENRY WILLIAM SANDS
California
THOMAS SCHNEIDER
California
MAX SCHOENGOLD
New York
MORRIS SCHUSTER
Michigan
DAVID SCRIBNER
New York
HERBERT SEMMEL
New York
CLAUDIA SHROPSHIRE
Mississippi
ROBERT H. SHUTAN
California
LOIS R. SIVIN
New York
GEORGE SLAFF
California
HIRAM E. SMITH
California
NATHAN S. SMITH
California
WILLIAM G. SMITH
Calfornia
SAMUEL P. SPORN
New York
PETER SPRUANCE
California
MICHAEL B. STANDARD
New York
EDWARD STERN
California
RALPH STEINBERG
New York
LEWIS A. STERN
New York
CHARLES B. STEWART
California
HENRY J. SZYMANSKI
Michigan
ROBERT J. TENNANT
California
REUBEN TERRIS
New York
MARTTIE THOMPSON
New York
JOHN E. THORNE
California
DONALD G. TOLLEFSON
California
NEIL J. TOMAN
Wisconsin
IRVING TUKEL
Michigan
MATT WADLEIGH
California
GEORGE G. WALKER
California
BRUCE WALTZER
Louisiana
DAVID P. WEAVER, JR.
California
GABRIEL WEBNER
California
PETER WEISS
New York
JOHN F. WELLS
California
WALTER T. WHITTMAN
New Jersey
JESSE WILLIAMS
Michigan
WARREN B. WILSON
California
SOL ZELZER

PROTEST, POLITICS, AND LITIGATION: POLITICAL AND SOCIAL CHANGE IN MISSISSIPPI, 1965 TO PRESENT

*Frank R. Parker**

The ultimate test of whether the promises of the fourteenth and fifteenth amendments can ever be made a reality has always been Mississippi. Historically, Mississippi has had the highest percentage of black people of any state (1960 — forty-two percent; 1970 — thirty-eight percent; 1980 — thirty-five percent)[1] and has been the scene of the most intransigent resistance to the constitutional rights of black people. It was Mississippi that led the South in black disenfranchisement with the "Mississippi Plan" of 1890 incorporating a literacy test and a poll tax, led the country in recorded lynchings — 534 from 1882 to 1952, and developed the most oppressive Jim Crow political, social and economic system.[2]

For black people in Mississippi as late as 1965, constitutional protections against state-imposed racial discrimination in every area of public life, voting, education, public employment, jury selection, etc. were all but completely ignored.[3] Most southern states had begun to dismantle their Jim Crow systems during the period 1954 to 1965, but as late as 1965 Mississippi remained a rigidly segregated state. As Anthony Lewis of the New York Times commented, "[t]he revolution that so profoundly changed American race relations between 1954 and 1964 stopped at the borders of Mississippi."[4] After five years of civil rights protest, voter registration drives, and community organizing by SNCC, CORE, SCLC, and the NAACP more intense than anywhere in the South,[5] only 6.7% of the eligible adult black population was registered to vote (28,500 out of a black voting age population of 422,273), there were no black elected officials outside the all-black town of Mound Bayou, not a single school district had dismantled its racially segregated schools, and most of the black people who had jobs were employed as field hands or household servants.[6] Civil rights protest efforts aimed at eliminating this rigid segregation were ruthlessly suppressed by police harassment, economic reprisals, and Ku Klux Klan terrorism.[7]

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[1] U.S. Bureau of the Census, 1980 Census of the Population (1980); U.S. Bureau of the Census, 1970 Census of the Population (1970); U.S. Bureau of the Census, 1960 Census of Population (1960).

[2] *See generally* V. Key Jr., Southern Politics in State and Nation ch. 25 (1940) (analyzing historical Southern treatment of blacks); Mississippi Conflict and Change chs. 10-11 (J. Loewen and C. Sallis eds. 1980) (discussion of blacks' situation in Mississippi).

The purpose of this article is to provide a brief overview of the impact of civil rights protest, politics, and litigation in producing political and social change in Mississippi in the post-1965 period. The article will especially focus on litigation as an instrument of social change in the areas of voting, education, and employment and the legal precedents established by the Mississippi civil rights litigation that remain relevant today.

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[3] *See* A. Moody, Coming of Age in Mississippi (1968) (concerning changes in discriminatory practices); F. Wirt, Politics of Southern Equality: Law and Social Change in Mississippi County (1971) (plight of Mississippi blacks); United States Commission on Civil Rights, Transcript of Hearings in Jackson, Mississippi (1965); United States Commission on Civil Rights, Voting in Mississippi (1965) (discussion of Mississippi's failure to implement equal voting practices).

[4] A. Lewis and the New York Times, Portrait of a Decade: The Second American Revolution 204 (1964).

[5] *See* C. Carson, In Struggle; SNCC and the Black Awakening of the 1960's (1981) (recognizing difficulties in civil rights era); S. Lawson, Black Ballots: Voting Rights in the South, 1944-1969 (1976) (explaining evolvement of black right to vote).

[6] *See* United States Commission on Civil Rights Political Participation, Appendix VI, at 218, Table 1, at 222-23 (1968); Southern Education Reporting Service, Statistical Summary State by State, of School Segregation-Desegregation in the Southern and Border Area from 1954 to the Present (1967); United States Commission on Civil Rights, Transcript of Hearings in Jackson, Mississippi, *supra* note 3, at 361-63.

[7] *See generally* Colby, *White Violence and the Civil Rights Movement* in Blacks in Southern Politics 31-48 (L. Moreland, R. Steed, and T. Baker, eds. 1987); C. Carson, In Struggle, *supra* note 5; M. King, Freedom Song: A Personal Story of the 1960's Civil Rights Movement (1987); J. Salter, Jackson, Mississippi: An American Chronicle of Struggle and Schism (1979); Transcript of Hearings in Jackson, Mississippi; Voting in Mississippi *supra* note 3.

I. VOTING

A. *The Passage of the Voting Rights Act in 1965*

Prior to 1965, Mississippi's racially discriminatory voter registration tests prevented more than 6.7% of the eligible black population from registering to vote, and case-by-case litigation proved inadequate to remedy the massive exclusion of blacks from the political process.[8] From 1961 to 1965, half of the Justice Department's voting discrimination and harassment lawsuits filed in the South were filed in Mississippi, but these cases failed to make more than a slight dent in the political exclusion of black citizens.[9] More was needed. In 1965, Congress passed the Voting Rights Act[10] to enforce the constitutional guarantees of the fourteenth and fifteenth amendments.[11]

The Voting Rights Act of 1965 was primarily the product of the black-led civil rights protest movement.[12] Martin Luther King's strategy was correct: black people had to be subjected to police dogs and fire hoses and to the police charge at the Edmund Pettus bridge in Selma, Alabama, before Congress could be spurred to decisive action.[13] David Garrow, in his book PROTEST AT SELMA, quotes Minnesota Senator Walter Mondale as saying after the Selma bridge incident: "Sunday's outrage in Selma, Alabama makes passage of legislation to guarantee Southern Negroes the right to vote an absolute imperative for Congress this year."[14]

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[8] *See generally Voting Rights: Hearings on the Voting Rights Act of 1965 Before the House Comm. on the Judiciary*, 89th Cong., 1st Sess. (1965); *Voting Rights: Hearings Before the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. (1965); H.R. REP. No. 439, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S. CODE CONG. & ADMIN. NEWS 2437; McMillan, *Black Enfranchisement in Mississippi: Federal Enforcement and Black Protest in the 1960's*, 43 J. SO. HIST. 351 (1977).

[9] *Senate Hearings*, *supra* note 7, at 1175-1445.

[10] PUB. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. § 1971, 1973 to 1973bb-1 (1982)).

[11] H.R. REP. No. 439, *supra* note 8, at 1.

[12] *See* D. GARROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965 1 (1978).

[13] *Id.* at 222-27.

The Voting Rights Act had three primary enforcement functions. First, it struck down the literacy tests, the other discriminatory voter registration tests, and the poll tax that had been used since 1890 to deny black people in the South the right to vote.[15] Second, it authorized the Justice Department to send federal registrars (called examiners) and poll watchers (called observers) into southern states to register voters and to ensure that elections were conducted fairly.[16] Third, and most important for the post-1965 era, section 5 of the Act required all covered states and localities to submit any changes in their voting laws to the Justice Department or to the federal district court in Washington for approval before they could be implemented.[17]

As a result of the passage of the Voting Rights Act, within two years black voter registration rates in every southern state jumped to over fifty percent of the black voting age population.[18] Mississippi's black voter registration rate soared from 6.7% in 1965 — the lowest in the South — to 59.9% in 1967 — the highest of any state covered by the Voting Rights Act.[19] In this brief two-year period black voters in Mississippi went from five percent of the statewide electorate to twenty-eight percent.[20]

B. *White Mississippi's Massive Resistance to Black Voting*

Contrary to popular expectations, however, the Voting

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[14] *Id.* at 82.

[15] *See* 42 U.S.C. § 1973b (1982) (suspending voter registration tests and devices in any state or political subdivision which used such tests and in which less than 50% of the eligible adults were registered or vote in the November, 1964 presidential election); 42 U.S.C. § 1973h (1982) (declaring that poll tax abridged the constitutional right of citizens to vote and authorizing the Attorney General to file suits for relief in any state or political subdivision with a poll tax requirement).

[16] 42 U.S.C. §§ 1973d-1973e; (1982) (federal examiners); 42 U.S.C. § 1973f (1982) (federal observers).

[17] 42 U.S.C. § 1973c (1982).

[18] POLITICAL PARTICIPATION, *supra* note 6, at 12-13.

[19] *Id.*

[20] *Id.*

Rights Act did not eliminate all the barriers to equal black political participation. In fact, the dramatic increases in black voter registration produced by the Voting Rights Act triggered a "massive resistance" reaction by the state's white supremacist establishment that ushered in a whole new "second generation" of discriminatory devices aimed at nullifying the newly-gained black vote.[21] Once again, Mississippi led the way. Deprived of the legal authority to deny blacks the right to register and vote by the Voting Rights Act, the Mississippi Legislature in its massive political resistance session of 1966 — within ten months after the Voting Rights Act became law — enacted a host of measures aimed at diluting black voting strength. The state legislature (1) gerrymandered congressional district lines by slicing up the black majority Delta district among three of the five districts; (2) increased the number of at-large, multi-member districts for electing members of the state legislature; (3) authorized counties to switch from district to at-large, county-wide elections for members of the county boards of supervisors and county school boards; (4) greatly increased the qualifying requirements for independent candidates for office, most of whom were black; (5) abolished elections for county school superintendents in a number of majority black counties; and (6) made it easier for the state legislature to consolidate majority black counties with majority white counties.[22]

The circumstances of the enactment of these laws, the legislative debate, and their impact indicate that a primary purpose was to eliminate or minimize the number of black majority election districts and to make it more difficult for Mississippi's newly-enfranchised black voters to elect candidates of their choice to office.[23] Mississippi's massive political resistance tactics had an immediate impact. In 1967, in the first statewide elections after the Voting Rights Act became law, only twenty-two out of 127 black candidates who ran or attempted to run for office were elected in an election in which over 2,000 state, county, and district offices were to be filled.[24] The election law changes enacted by the state legislature in 1966 were a primary factor in the massive defeat of black candidates in the 1967 elections. This massive political resistance strategy was not limited to Mississippi. Similar tactics were employed throughout the South to dilute the black vote and to prevent black candidates from being elected.[25]

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[21] *See* Political Participation, *supra* note 6, chs. 1 and 2.

[22] *See* Political Participation, *supra* note 6, at 21-23, 25-26, 30-37, 42-43, 44-47. The 1966 legislature also enacted an "open primary" bill abolishing party primaries and requiring candidates to receive a majority vote to win in the general election. This bill, however, was vetoed by Governor Paul B. Johnson, Jr.; *see* F. Parker and B. Phillips, Voting in Mississippi: A Right Still Denied 74-75 (1981).

[23] *Id.*

Success in overcoming these vote dilution devices was critical to the goal of equal political participation for black voters. Without victory over these devices, all prior success — over the white primary, the literacy tests, and the poll tax — would be negated. Black voters would be able to register and vote but would be unable to elect candidates of their choice to office.

C. *The Litigation Challenging the Massive Resistance Effort*

Initially, the Supreme Court was unprepared to cope with these new challenges to the right to vote. In 1967, the Court rejected a constitutional challenge to the racial gerrymandering of Mississippi's five congressional districts.[26] The result was that black voters were denied the opportunity to elect a black member of Congress for twenty years. Finally, in 1986, after additional litigation under the Voting Rights Act that resulted in restoring a majority black Delta district, Mike Espy, a black lawyer from Yazoo City, was elected to the U.S. House of Representatives from the reconstituted Delta congressional district.[27]

Similarly, the federal courts initially were resistant to black voters' claims that at-large legislative elections in multi-member districts diluted black voting strength. Black voters were denied all but token representation in the Mississippi Legislature[28] until — after fourteen years of litigation, including nine trips to the Supreme Court — the state legislative reapportionment case finally resulted in the elimination of all multi-member legislative districts. Seventeen black state legislators were elected from single-member districts in the 1979 state legislative elections.[29]

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[24] *Id.* at 15.

[25] *Id.*, chs. 1 and 2.

[26] Connor v. Johnson, 386 U.S. 483 (1967), *aff'g* 279 F. Supp. 619 (S.D. Miss. 1966)(three-judge court).

[27] Jordan v. Winter, 541 F. Supp. 1135 (N.D. Miss. 1982)(three-judge court), *vacated and remanded*, 461 U.S. 912 (1983), 604 F. Supp. 807 (N.D. Miss.)(three-judge court), *aff'd mem. sub. nom.* Mississippi Republican Executive Committee v. Brooks, 469 U.S. 1002 (1984). *See also* Mississippi v. Smith, 541 F. Supp. 1329 (D.D.C. 1982)(three-judge court), *appeal dismissed*, 461 U.S. 912 (1983). For a discussion of this litigation, see Parker, *The Mississippi Congressional Redistricting Case: A Case Study in Minority Vote Dilution*, 28 How. L.J. 397 (1985).

D. *The Allen v. State Board of Elections Decision*

Success over the Mississippi Legislature's massive resistance strategy depended upon the courts recognizing the principle of minority vote dilution — that voting laws that dilute black voting strength and prevent black voters from electing candidates of their choice abridge the right to vote just as much as laws that prevent black citizens from voting. The Supreme Court first gave effect to this principle in three Mississippi cases — all involving vote dilution challenges to elements of the legislature's massive resistance programs — that were decided as *Allen v. State Board of Elections.*[30] In *Allen*, the Supreme Court ruled that voting law changes that diluted the effectiveness of black votes were subject to the federal preclearance requirement of section 5 of the Voting Rights Act, even if they did not directly interfere with the right to register or cast a ballot. In the case challenging the Mississippi Legislature's statute authorizing switches to at-large county supervisors elections, the Court ruled: "This type of change could . . . nullify [black voters'] ability to elect the candidate of their choice just as would prohibiting some of them from voting."[31] For the first time in a case raising actual racial discrimination claims, the Supreme Court recognized that the right of black citizens to vote can be affected as much by vote dilution as by vote denial, and this recognition makes the Supreme Court's decision in *Allen v. State Board of Elections* the *Brown v. Board of Education* of voting rights.[32]

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[28] Rep. Robert G. Clark, the one black legislator elected in 1967, was the only black legislator in the 174-member body until three additional black representatives were elected from single-member districts in Hinds County in 1975. PARKER AND PHILLIPS, VOTING IN MISSISSIPPI, *supra* note 22, at 19-31.

[29] *See* Connor v. Coleman, 440 U.S. 612, 614-24 (1979); PARKER & PHILLIPS, VOTING IN MISSISSIPPI, *supra* note 22, at 19-31; Comment, *Mississippi and the Voting Rights Act: 1965-1982*, 52 MISS. L.J. 803, 834-42 (1982).

[30] 393 U.S. 544 (1969). The three cases were Fairley v. Patterson, 282 F. Supp. 164 (S.D. Miss. 1967)(three-judge court), *rev'd sub nom.* Allen v. State Bd. of Elections, 393 U.S. 544 (1969) (challenging switch from district to at-large election of county supervisors); Bunton v. Patterson, 281 F. Supp. 918 (S.D. Miss. 1967)(three-judge court), *rev'd sub nom.* Allen v. State Bd. of Elections, 393 U.S. 544 (1969)(challenging switch from election to appointment of county school superintendents); and Whitley v. Johnson, 296 F. Supp. 754 (S.D. Miss. 1967)(three-judge court), *rev'd sub nom.* Allenv. State Bd. of Elections, 393 U.S. 544 (1969)(challenging increases in qualifying requirements for independent candidates).

The *Allen* decision was of critical importance to black political advancement in the South. States and localities covered by section 5 of the Voting Rights Act must submit any and all voting law changes, no matter how minor, either to the Justice Department or to the Federal District Court in Washington for pre-clearance.[33] Since 1969, the Justice Department has lodged section 5 objections to more than 2,000 voting law changes in the South, including congressional redistricting and legislative reapportionment plans in every covered state.[34]

E. The Constitutional Prohibition Against Minority Vote Dilution

The minority vote dilution principle that first was recognized in the section 5 context in *Allen* was then given further force in *White v. Regester*,[35] in which the Supreme Court in 1973 struck down as unconstitutional at-large legislative districts in Texas. In *White v. Regester*, the Supreme Court expanded the principle of minority vote dilution recognized in *Allen* into a constitutional prohibition. The Court held that the fourteenth amendment prohibits methods of election that deny minority voters an equal opportunity "to participate in the political processes and to elect legislators of their choice."[36] The Supreme Court's decision in *White v. Regester* was critical to eliminating discriminatory barriers to black political advancement because there are discriminatory election laws that are not subject to Federal preclearance under section 5 of the Voting Rights Act, either because they were adopted before the Voting Rights Act became law or because they are utilized in states not covered by section 5.[37] For example, Jackson, Mississippi adopted at-large city council elections in 1912. After black voters in Jackson gained the right to vote in 1965, city-wide voting prevented black voters — who comprised only thirty-nine percent of the city-wide population — from electing candidates of their choice to the city council. But Jackson's at-large voting system was not subject to section 5 pre-clearance because it was adopted before 1965. Black voters therefore were required to file a constitutional challenge to Jackson's at-large city council election system and to litigate the case under the *White v. Regester* standard.[38]

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[31] *Allen*, 393 U.S. at 569.

[32] In *Allen*, the Supreme Court did not invalidate the challenged statutes, but only held that because of their potential for diluting black votes they could not be implemented until they had been precleared by the Attorney General or the District Court for the District of Columbia under § 5 of the Voting Rights Act. When they were submitted to the Attorney General, the Attorney General (by his designated agent, the Assistant Attorney General in charge of the Civil Rights Division) lodged a § 5 objection to the laws, ruling that they "had as their purpose and have had as their effect the denial and bridgement of the right to vote on account of race or color." Section 5 objection letter from Jerris Leonard, Assistant Attorney General, Civil Rights Division, to A. F. Summer, Attorney General of Mississippi (May 21, 1969).

[33] *Allen*, 393 U.S. at 566.

[34] U.S. DEPARTMENT OF JUSTICE, VOTING SECTION, CIVIL RIGHTS DIVISION, NUMBER OF CHANGES TO WHICH OBJECTIONS HAVE BEEN INTERPOSED BY STATE AND YEAR, 1965 - DECEMBER 31, 1987 (1988); U.S. DEPARTMENT OF JUSTICE, VOTING SECTION, CIVIL RIGHTS DIVISION, COMPLETE LISTING OF OBJECTIONS PURSUANT TO SECTION 5 OF THE VOTING RIGHTS ACT OF 1965, (1988).

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[35] 412 U.S. 755 (1973).

[36] *Id.* at 766.

[37] Section 5, as applied to the states first covered in 1965, applies only to voting law changes enacted or implemented after November 1, 1964. 42 U.S.C. § 1973c (1982). Also, because of the coverage formulas, § 5 presently applies only to nine whole states (Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia) and to parts of eight others (California (four counties), Florida (five counties), Michigan (parts of two counties), New Hampshire (parts of seven counties), New York (only Manhattan, Brooklyn, and the Bronx), North Carolina (40 counties), South Dakota (two counties), and Arizona (12 counties)). U.S. Dep't of Justice, *Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, As Amended*, 28 C.F.R. part 51, App. (1988).

[38] This litigation proved unsuccessful because, as discussed *infra*, the Supreme Court subsequently adopted a new legal standard that required proof of discriminatory intent, and the federal courts ruled that there was no evidence that at-large voting in Jackson had been adopted or maintained for a discriminatory intent. Kirksey v. City of Jackson, 506 F. Supp. 491 (S.D. Miss. 1981), *aff'd*, 663 F.2d 659 (5th Cir. 1981). Subsequently, a new lawsuit was filed after the 1982 amendment to section 2 of the Voting

From 1973 to 1980, the *White v. Regester* decision was the chief vehicle for constitutional challenges to discriminatory at-large elections and racial gerrymandering of district lines not covered by section 5, and scores of cases were filed and won.[39] After the Mississippi Legislature's 1966 statute providing for at-large election of county supervisors was invalidated under section 5 of the Voting Rights Act, a number of Mississippi counties continued the massive resistance strategy at the local level by gerrymandering county supervisors' districts to prevent black voters from electing county officials of their choice.[40] Voting right lawsuits challenging these discriminatory county redistricting plans under the *White v. Regester* standard culminated in the landmark Fifth Circuit decision in *Kirksey v. Board of Supervisors of Hinds County*[41] in which the Court of Appeals, sitting en banc, held that a county redistricting plan that fragmented the black population concentration in Jackson denied black voters an equal opportunity to elect candidates of their choice and perpetuated a past history of discrimination in voting in violation of black voters' fourteenth amendment rights.

However, the usefulness of *White v. Regester* was severely undermined in 1980 when the Supreme Court in *City of Mobile v. Bolden*[42] reinterpreted the fourteenth amendment standard to require proof of discriminatory intent. As a result, court rulings that had invalidated discriminatory methods of election under *White v. Regester* were reversed for failure to prove discriminatory intent as required by *Bolden*.[43] Discriminatory intent is

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Rights Act, discussed *infra*, and this led to the abandonment of Jackson's citywide voting system. Kirksey v. Danks, 608 F. Supp. 1448 (S.D. Miss. 1985).

[39] *See* Parker, *The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 VA. L. REV. 715, 718-26 (1983)(discussing cases litigated under *White v. Regester* standard); Bickerstaff, *Reapportionment by the State Legislatures: A Guide for the 1980's*, 34 SW. L.J. 607, 643-51 (1980)(same); Bonapfel, *Minority Challenges to At-Large Elections: The Dilution Problem*, 10 GA. L. REV. 353, 387-90 (1976)(same).

[40] *See* Parker, *County Redistricting in Mississippi: Case Studies in Racial Gerrymandering*, 44 MISS. L.J. 391, 418 (1973) (county redistricting has been used to dilute black voting strength).

[41] 554 F.2d 139 (5th Cir.)(en banc), *cert. denied*, 434 U.S. 968 (1977).

[42] 446 U.S. 55 (1980).

[43] Parker, *The "Results" Test of Section 2 of the Voting Rights Act*, supra note 39, at 735-36.

very difficult to prove because public officials do not often make public statements exhibiting a racial purpose, actions taken for a discriminatory intent frequently can be disguised by a nondiscriminatory justification, and white federal judges usually are unwilling to brand local public officials as racists to grant relief to black litigants.[44]

F. The 1982 Amendment to Section 2 of the Voting Rights Act

The Supreme Court's *Mobile* decision required Congress in 1982 to amend section 2 of the Voting Rights Act to restore the *White v Regester* standard and to make it a statutory prohibition of the Voting Rights Act.[45] Under this 1982 amendment, section 2 now prohibits any voting law or practice that results in discrimination, regardless of its intent.[46]

Section 2 has been phenomenally successful. The Justice Department estimates that since 1982 more than 1,300 jurisdictions have changed their methods of electing officials in response to litigation or the threat of litigation under section 2.[47] Section 2 has been applied in Mississippi, and throughout the South and the nation to strike down discriminatory congressional redistricting, at-large elections for state legislators, at-large city council elections in northern cities, at-large state judicial elections, and discriminatory voter registration procedures that limit black citizens' opportunities to register to vote.[48]

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[44] *Id.* at 740-46.

[45] H.R. Rep. No. 97-227, 97th Cong., 1st Sess. 28-32 (1981); S. Rep. No. 97-417, 97th Cong., 2d Sess. 36-37 (1982), *reprinted in* 1982 U.S. Code Cong. & Admin. News 177, 214-15.

[46] 42 U.S.C. § 1973 (1988). *See* Parker, *supra* note 39, at 750-64.

[47] U.S. Dep't of Justice, Civil Rights Division, Enforcing the Law, Voting Rights 2 (1987).

[48] For Mississippi, see, e.g., Mississippi State Chapter, Operation PUSH v. Allain, 674 F. Supp. 1245 (N.D. Miss. 1987) (discriminatory voter registration procedures); Martin v. Allain, 658 F. Supp. 1183 (S.D. Miss. 1987)(at-large judicial elections); Jordan v. Winter, *supra* note 27 (congressional redistricting); Jordan v. City of Greenwood, 599 F. Supp. 397 (N.D. Miss. 1984)(at-large city council elections). *See also* Thornburg v. Gingles, 478 U.S. 30 (1986)(multi-member legislative districts); McNeil v. City of Springfield, 658 F. Supp. 1015 (C.D. Ill. 1987)(at-large city council elections).

G. *The Impact of Voting Rights Enforcement*

What impact have these developments had on Mississippi, the test case of progress in equal rights? The voting rights litigation of the 1970's and 1980's has removed many of the barriers to black political participation and has spurred black political mobilization. As a result, Mississippi now has what the New York Times has called a "Mississippi yuppie" governor who was elected with less than half of the white vote but ninety percent of the black vote[49] and almost 600 black elected officials — more than any state in the nation — including a black member of Congress, a black state supreme court justice, twenty-two black state legislators, sixty-seven black county supervisors, and more than 220 black city council members.[50] As Mary King, a former civil rights worker in Mississippi and author of the recently-published memoir, Freedom Song, A Personal Story of the 1960's Civil Rights Movement, noted in a 1987 New York Times interview:

> People often ask me if I believe any progress has really been made in civil rights . . . I tell them that it may have taken 23 years, but a black lawyer, Mike Espy, was elected last fall to Congress from a majority black district in the Mississippi delta. Back in 1964 those black counties didn't have a single black registered voter.[51]

This is not to say that all barriers to equal black participation in the electoral process have been removed; they haven't. Today, although black people constitute eleven percent of the nation's population, black elected officials comprise less than 1.5% of all elected officials nationwide.[52] Although Mississippi now has almost 600 black elected officials, they comprise only a little more than eleven percent of the total number of elected officials in a state that is thirty-one percent black in voting age population, indicating that there are still some barriers to equal black political participation in the state.[53] True justice in voting rights cannot be achieved until all the discriminatory barriers that prevent black voters from registering to vote and having an equal opportunity to elect candidates of their choice have been eliminated.

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[49] Boyer, *The Yuppies of Mississippi; How They Took the Statehouse*, N.Y. Times, Feb. 28, 1988 (Magazine) at 24, 40.

[50] Joint Center for Political Studies, Black Elected Officials: A National Roster (17th ed. 1988).

[51] Gamarekin, *One Woman's Chronicle of the Civil Rights Struggle*, N.Y. Times, August 31, 1987, at 12, col.6.

[52] Joint Center for Political Studies, Black Elected Officials, A National Roster, *supra* note 50, at 1.

II. EDUCATION

A. *The Damage from Segregated Schools*

The Supreme Court, in *Brown v. Board of Education*, held that separate white and black schools are "inherently unequal."[54] Racially segregated schools damaged both black and white school children in Mississippi by producing baseless attitudes of racial inferiority in black students and racial superiority in white students.[55] In segregated systems, black school children had limited educational opportunities and usually attended inadequate school facilities in which they were educated by poorly-trained teachers.[56] The per-pupil expenditures for heavily-black counties showed shocking disparities between white and black children.

The 1960 Census statistics for Mississippi show the damaging impact this system had on black citizens. Half of the black population had completed only six years of school or less, and over 32,000 black adults had no formal education at all. By comparison, over half of all white adults had completed eleven years of education or more. Only 7.6% of the black population were high school graduates, compared with almost forty-two percent of all adult whites.[57]

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[53] *Id.*

[54] *Brown*, 374 U.S. 495 (1954).

[55] On the consequences of school desegregation on white and black attitudes, see THE CONSEQUENCES OF SCHOOL DESEGREGATION (C. Rossell & W. Hawley, eds. 1983); RACIAL ATTITUDES IN AMERICA (H. Schuman, C. Steeh & L. Bobo, eds. 1985).

[56] In 1950, Mississippi employed over 700 black teachers who had not completed high school, although every white teacher was at least a high school graduate. In the 1963-64 school year, there were over 1,900 white teachers with graduate degrees, but fewer than 500 black teachers had graduate degrees. UNITED STATES COMMISSION ON CIVIL RIGHTS, VOTING IN MISSISSIPPI 44-45 (1965).

[57] U.S. BUREAU OF THE CENSUS, 1960 CENSUS OF THE POPULATION, Vol. I, part 26,

B. *The School Desegregation Effort*

Of all the southern states, Mississippi was the last to begin compliance with the *Brown* decision. The White Citizens Council was formed in Mississippi to resist school desegregation, not only in Mississippi but across the South, and efforts by civil rights groups to gain voluntary compliance with the *Brown* decision were strenuously and sometimes violently resisted.[58] School desegregation petitions circulated throughout the state by the NAACP and other groups after 1954 failed to produce any results.[59] School desegregation litigation was required to force compliance. The first school desegregation lawsuits were not filed until 1963, two by the Justice Department against the Biloxi and Gulfport school districts and three by the NAACP Legal Defense Fund against the Jackson, Leake County, and Biloxi school districts.[60] All five of these cases were dismissed by District Judge Sidney Mize and extensive litigation and appeals were required.[61] By the 1964-65 school year, only fifty-seven of Mississippi's 280,000 black school children attended formerly all-white schools; one year later, the overall desegregation rate for Mississippi stood at 0.02% — still the lowest in the South.[62]

Additional school desegregation suits were filed by the Department of Justice and the NAACP Legal Defense Fund, and the Department of Health, Education, and Welfare (HEW) began to force school districts to desegregate under penalty of loss of their federal funds pursuant to Title VI of the Civil Rights Act of 1964.[63] Most of Mississippi's school districts were desegregated by federal court litigation — there were sixty-two school

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Mississippi, 26-118, Table 47 (1963).

[58] *See, e.g.*, N. McMillan, The Citizens Council (1971).

[59] Mississippi: Conflict and Change, *supra* note 2, at 252-53.

[60] United States v. Biloxi Municipal Separate School District, 8 Race Rel. L. Rep. 539 (S.D. Miss. 1963); United States v. Gulfport Municipal Separate School District, 8 Race Rel. L. Rep. 540 (S.D. Miss. 1963); Evers v. Jackson Municipal Separate School District, 8 Race Rel. L. Rep. 968 (S.D. Miss. 1963); Hudson v. Leake County School Board, 8 Race Rel. L. Rep. 970 (S.D. Miss. 1963); Mason v. Biloxi Municipal Separate School District, 8 Race Rel. L. Rep. 972 (S.D. Miss. 1963).

[61] *Id.*

[62] Southern Education Reporting Service, Statistical Summary, *supra* note 6, at 43.

[63] 42 U.S.C. § 2000d 1-1 (1964).

desegregation lawsuits litigated in Mississippi by the Department of Justice and the NAACP Legal Defense Fund, and forty-two districts were desegregated by HEW under the threat of loss of federal funds.[64]

As in other Southern states, the school desegregation process in Mississippi developed in two stages, the "freedom of choice" stage and the "school integration" stage.[65] Under court orders to desegregate or under HEW mandates, all Mississippi school districts initially adopted "freedom of choice" school desegregation plans under which students theoretically were given the opportunity to choose which school to attend.[66] In practice, this meant that black students could obtain an integrated education only by transferring to the white schools.[67] Frequently these freedom of choice plans began with the first grade and proceeded a grade a year for each succeeding school year.[68]

Little school desegregation actually was accomplished under this system. Freedom of choice placed the burden of desegregation on black parents and school children.[69] School officials erected numerous administrative barriers to black students transferring to white schools, and black families choosing to send their children to the white schools suffered from Ku Klux Klan terrorism and violence, harassment of black children in school by white students and teachers, and economic reprisals, including eviction from their homes and loss of credit and jobs.[70] Freedom of choice plans generally left the black schools all-black, and resulted in very little integration of the white schools.[71]

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[64] M. Leventhal, Agencies Responsible for Desegregation of Mississippi School Districts.

[65] *See generally* G. Orfield, Public School Desegregation in the United States, 1968-1980 (1983); Toward Equal Educational Opportunity: Hearings Before the Senate Select Comm. on equal Education Opportunity, 92nd Cong., 2d Sess. (1972).

[66] United States Commission on Civil Rights, Southern School Desegregation 1966-67 45-46 (1967).

[67] *Id.* at 45-69.

[68] *Id.*

[69] *Id.* at 47-69, 94.

[70] *Id.*

[71] *Id.*

C. *The Alexander v. Holmes County Board of Education Decision*

In 1968, in *Green v. School Board of New Kent County*,[72] a Virginia case, the Supreme Court held freedom of choice plans to be constitutionally inadequate where they failed to achieve full school desegregation. The Justice Department and attorneys with the NAACP Legal Defense Fund (LDF) responded by filing motions in twenty-three pending cases, involving a total of thirty-three school districts, in the United States District Court for the Southern District of Mississippi seeking new, more effective desegregation plans. When the district court denied any relief, the Court of Appeals for the Fifth Circuit reversed and ordered new plans implemented by September, 1969 for the 1969-70 school year.[73] The Fifth Circuit found that under freedom of choice not a single white child attended a Negro school in any of the districts, the percentage of Negro children attending white schools ranged from zero to sixteen percent, there was only token faculty integration, and school activities continued to be substantially segregated.[74]

Under political pressure from Mississippi Senator John Stennis, the Nixon Administration then switched sides and in August, 1969, asked the Fifth Circuit for a one-year delay in implementing the school desegregation plans that already had been approved by HEW's technical assistance staff.[75] The Fifth Circuit granted the Justice Department's request for further delay.[76] The LDF attorneys then sought relief from the Supreme Court, and the Court in October in *Alexander v. Holmes County Board of Education* reversed, holding that "continued operation of segregated schools under a standard of allowing 'all deliberate speed' for desegregation is no longer constitutionally permissible . . . [T]he obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools."[77] The *Alexander* decision marks an important turning point in the school desegregation effort. As Gary Orfield notes, "the Court declared that the time for gradualism was over, and that southern districts must correct violations immediately."[78]

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[72] 391 U.S. 430 (1968).

[73] United States v. Hinds County School Board, 417 F.2d 852 (5th Cir. 1969).

[74] *Id.* at 855.

[75] Rosenthal, "*Stennis Linked to Desegregation Delay*," N.Y. Times, September 19, 1969, at 36, col. 3; Letter from Robert Finch, Secretary of Health, Education, and Welfare, to Chief Judge John R. Brown, U.S. . . .,(August 19, 1969), *reprinted in* Alexander v. Holmes County Board of Education, 396 U.S. 19 app. at 53a-54a (1969).

[76] Order Granting Request for Delay, *Hinds County School Board*, supra note 73.

Nine days later, the Fifth Circuit ordered thirty school districts to begin implementing the HEW plans in December, 1969, in the middle of the 1969-70 school year.[79] The Fifth Circuit's decision was unprecedented. Never before had an appeals court ordered simultaneous desegregation of thirty school districts in the middle of a school year, particularly over the opposition of the federal government.[80] Within ten months, 146 of Mississippi's 148 school districts had been forced to abandon ineffective freedom of choice plans and to adopt new desegregation plans that revised attendance boundaries and employed zoning, pairing, busing, and other remedies to achieve fully integrated school systems.[81]

D. Challenges to State Aid to the Segregation Academies

Simultaneously with this school desegregation effort, Mississippi whites opposed to public school desegregation organized a statewide system of private segregation academies to provide white students an alternative to integrated public schools.[82] By 1970, 155 segregation academies had been opened, enrolling 42,000 white students.[83] The Mississippi Legislature assisted this effort by providing tuition grants and free textbooks to students attending segregation academies, both of which were challenged and struck down as unconstitutional state aid to segregated education.[84]

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[77] Alexander v. Holmes County Bd. of Educ., 396 U.S. 19, 20 (1969).

[78] ORFIELD, PUBLIC SCHOOL DESEGREGATION 1.

[79] United States v. Hinds County School Board, 423 F.2d 1264 (5th Cir. 1969).

[80] L. Munford, Black Gravity: Desegregation in 30 Mississippi School Districts 20-21 (1971) (unpublished senior thesis, Princeton University).

[81] *Id.* at 26.

[82] *See* Champagne, *The Segregation Academy and the Law*, 42 J. NEGRO EDUC. 58-66 (1973).

[83] Norwood v. Harrison, 413 U.S. 455, 457 (1973).

Mississippi black parents and school children also challenged Internal Revenue Service rulings granting tax exempt status and deductibility of contributions to Mississippi segregation academies.[85] The District Court for the District of Columbia in *Green v. Connally*[86] held that these federal tax benefits violated the Internal Revenue Code and federal policies against governmental support for racial segregation. This decision involving private schools in Mississippi ultimately resulted in the Supreme Court's 1983 decision in *Bob Jones University v. United States*,[87] in which the Court struck down the Reagan Administration's effort to reverse the Internal Revenue Service policy against providing federal tax benefits to segregated private schools that was adopted in response to the *Green v. Connally* litigation.

E. The Impact of the School Desegregation Effort

The school desegregation litigation of the 1960's and early 1970's dismantled the *de jure* dual, racially segregated school systems in Mississippi and generally eliminated the one-race schools and the one-race faculties. This litigation, however, did not completely eliminate racial segregation in the public schools. By 1980 only 23.6% of the black students in Mississippi were in predominantly white schools, and 36.7% of the black students were in schools that were 90-100% minority.[88] By 1987, the percentage of black students attending 90-100% black schools increased to 38.7%.[89] The level of actual school and classroom integration experienced by black school children has been mitigated by "white flight" to segregation academies, ability grouping and tracking, disproportionate placement of black students in classes for the educable mentally retarded, and disproportionate suspension, punishment, and expulsion of black students.[90]

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[84] The Mississippi tuition grant legislation was ruled unconstitutional in Coffey v. State Educational Finance Commission, 296 F. Supp. 1359 (S.D. Miss. 1969) (three-judge court), and the state program for providing state-supplied textbooks to segregated private schools was struck down by the Supreme Court in Norwood v. Harrison, *supra* note 83.

[85] Green v. Connally, 330 F. Supp. 1150 (D.D.C.)(three-judge court), *aff'd mem. sub nom.* Coit v. Green, 404 U.S. 997 (1971).

[86] *Id.*

[87] 461 U.S. 574 (1983).

[88] ORFIELD, PUBLIC SCHOOL DESEGREGATION 6, App. A.

[89] *Across the USA: News From Every State*, USA Today, July 28, 1987.

Data from Mississippi confirms national studies that school desegregation has had positive benefits. School desegregation has increased the educational achievement of black students[91] and has promoted attitudes of racial tolerance among Mississippi whites.[92] By 1981, sixty-nine percent of white Mississippians surveyed expressed support for public school integration.[93]

School desegregation has been one of the most important education reforms this country has experienced. But, in addition to school desegregation, the period from 1960 to 1980 also was a period of increased federal and state funding for education, reforms in curriculums and teaching methods, and increased qualifications for teachers. Mississippi also became more urbanized and industrialized. The changes which occurred during this period, which include school desegregation as a major factor, have produced substantial improvements in educational attainment among black people in Mississippi. The 1980 Census statistics show that the median educational attainment for blacks was 9.4 years of school, compared with six years in 1960. By 1980, thirty-three percent of all black adults were high school graduates, compared with only 7.6% in 1960, and sixty percent of all young black adults 18 to 24 years of age had completed high school.[94]

III. EMPLOYMENT

The enactment of Title VII of the Civil Rights Act of 1964,[95] which outlaws racial discrimination in employment, marks the beginning of the desegregation of the Mississippi work force. Enforcement efforts by the Equal Employment Opportunity Commission, which opened an office in Jackson in the early 1970's, and Title VII lawsuits have gone far to open up employment opportunities for black people across the nation.[96]

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[90] *See generally* J. HOCHSCHILD, THIRTY YEARS AFTER *Brown* 5-6 (1985).

[91] Frary and Goolsby, *Achievement of Integrated and Segregated Negro and White First Graders in a Southern City*, 8 INTEGRATED EDUCATION 48, 52 (1970).

[92] Abney, *Legislating Morality; Attitude Change and Desegregation in Mississippi*, 11 URBAN EDUCATION 333, 335-36 (1976).

[93] S. Shaffer, A Traditionalist Political Culture in Transition: The Case of Mississippi, Figure 1 (1987) (paper delivered at 1987 annual meeting of American Political Science Association, Chicago, 1987).

[94] U.S. BUREAU OF THE CENSUS, 1980 CENSUS OF THE POPULATION 26-58 (1980); U.S. BUREAU OF THE CENSUS, 1960 CENSUS OF THE POPULATION 26-117 (1960).

[95] 42 U.S.C. § 2000e *et seq.* (1982).

But the Civil Rights Act did not prohibit racial discrimination in employment by state and local governmental agencies until 1972.[97] Prior to 1972, employment discrimination cases against governmental agencies had to be filed under the fourteenth amendment and section 1983 of title 42 of the United States Code, and constitutional litigation in Mississippi contributed to the development of national legal standards for job discrimination cases.

A. *The Effort to Desegregate the Mississippi Highway Patrol*

In May, 1970, two young black men were shot and killed and twelve young black people were seriously wounded when officers of the all-white Mississippi Highway Patrol without provocation fired a twenty-nine-second barrage of gunfire into a crowd of black students and neighborhood residents at Jackson State University.[98] One of the outcomes of this "Jackson State massacre"[99] was the filing of an employment discrimination lawsuit against the Highway Patrol on behalf of two black men who had been denied application forms for patrol officer positions. This case, *Morrow v. Crisler*,[100] and another case, *Wade v. Mississippi Cooperative Extension Service*,[101] were the first two state government employment discrimination cases filed in Mississippi in recent times.

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[96] *See* UNITED STATES COMMISSION ON CIVIL RIGHTS, EQUAL EMPLOYMENT OPPORTUNITY (1975).

[97] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(1), 86 Stat. 103 (1972).

[98] *See* Burton v. Waller, 502 F.2d 1261, 1271 (5th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975) (gun fire inflicted deaths, injuries, and damaged property).

[99] A lawsuit for damages was unsuccessful, among other reasons, because of the difficulty of determining who shot whom. *Id.* at 1284.

[100] 491 F.2d 1053 (5th Cir. 1973), *cert. denied*, 419 U.S. 895 (1973), *on remand*, 412 F. Supp. 494 (S.D. Miss. 1976), *aff'd in part, rev'd in part*, 580 F.2d 1284 (5th Cir. 1978).

[101] 372 F. Supp. 1256 (N.D. Miss. 1974), 378 F. Supp. 1251 (N.D. Miss. 1975), *aff'd in part, vac'd in part*, 528 F.2d 508 (5th Cir. 1976).

Since 1938, when the Highway Patrol was formed, the Patrol had never employed a black person as a sworn officer, and the only blacks it had ever hired were janitors and cooks at its training academy.[102] After a trial, the district court found that this constituted a pattern and practice of racial discrimination in employment that violated the fourteenth amendment, although "unintentional,"[103] and entered a court order prohibiting racial discrimination in hiring and terms and conditions of employment. The court refused, however, to order any hiring quotas or any other form of affirmative hiring relief.[104]

The district court's order prohibiting further racial discrimination in hiring did little to eliminate the patrol's all-white composition. In the next two years, the patrol hired ninety-one whites as patrol officers, but only five blacks (plus a sixth black recruit in training school).[105] One of the reasons for this low black hiring rate was that after the district court's injunction was entered, the patrol adopted a written examination, the Army General Classification Test (AGCT), a test that had been developed by the Army during World War II for making job assignments, not for screening out applicants.[106] In the two years in which it was administered by the patrol, 299 whites were given passing scores out of 449 whites who took the test (pass rate of 66.6%), but only twenty-five blacks passed out of 194 black applicants (pass rate of 12.9%).[107]

On plaintiffs' appeal from the district court's 1971 injunction, the Fifth Circuit, sitting en banc, ruled that the patrol's hiring and testing statistics since 1971 showed that the district court's order was insufficient to eliminate the effects of past racial discrimination.[108] The Fifth Circuit ordered additional recruitment measures, reexamination of the patrol's hiring criteria, and "some affirmative hiring relief," which could take the form of "*temporary* one-to-one or one-to-two [white-black] hiring, the creation of hiring pools, or a freeze on white hiring, or any other form of affirmative hiring relief until the Patrol is effectively integrated."[109] Circuit Judge J.P. Coleman, in his dissent, suggested that the patrol should hire all black applicants with qualifications equal to or higher than other applicants.[110]

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[102] Morrow v. Crisler, 4 Empl. Prac. Dec. (CCH) ¶ 7563 at 5238 (S.D. Miss. 1971).

[103] *Id.* at 5242. Employment discrimination litigation under the fourteenth amendment was severely curtained when, in 1976 in a District of Columbia job discrimination case, the Supreme Court held that the fourteenth amendment required proof of discriminatory purpose, Washington v. Davis, 426 U.S. 229, 246 (1976).

[104] Morrow v. Crisler, 4 Empl. Prac. Dec. (CCH) ¶ 7541 (S.D. Miss. 1971).

[105] Morrow v. Crisler, 491 F.2d 1053, 1055 (5th Cir. 1974) (en banc).

[106] Morrow v. Crisler, 5 Empl. Prac. Dec. (CCH) ¶ 8590 at 7729 (S.D. Miss. 1972); *Technical Report for the First Civilian Edition of the AGCT* 6 (1960).

[107] Appellants' Response to Defendants' Submission on Employment and Testing Statistics Since January 1, 1972. *Morrow*, 49 F.2d at 1055.

B. *The Impact of the Fifth Circuit's Morrow Decision*

The Fifth Circuit's opinion in *Morrow* had a significant impact on employment discrimination litigation in the South. The *Morrow* case was one of the first cases — and certainly the first against a governmental agency — in which the Fifth Circuit had ordered quotas or other affirmative hiring relief to eliminate the effects of past discrimination.

Subsequent developments have proven the effectiveness of race-conscious remedies in employment discrimination cases. After further hearings, the district court ordered the patrol to revise its recruitment and testing procedures and to hire all black applicants who met the minimum nondiscriminatory qualifications.[111] The first recruit training class held after the district court's new order was three-fourth's black, and since then training classes have been one-third to one-half black or more. As of 1988, twenty percent of the patrol's 300 troopers were black, including a black troop commander (captain), a black personnel officer (captain), a black director of internal affairs, and two blacks serving as assistant inspectors in charge of two of the patrol's nine districts.[112]

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[108] *Id.*

[109] *Id.* at 1056.

[110] *Id.* at 1061, 1063.

[111] Morrow v. Dillard, 412 F. Supp. 494, 502-04 (S.D. Miss. 1976).

[112] Defendants' Submission of Semi-Annual Report, filed Nov. 1, 1988, Morrow v. Dixon, Civ. No. 4716-N, (S.D. Miss.).

C. *The Challenge to Employment Discrimination in the Mississippi Cooperative Extension Service*

The second constitutional employment discrimination case filed, *Wade v. Mississippi Cooperative Extension Service*, had a similar history. Prior to 1965, the extension service, a federally-funded state agency that provides services to farmers and farm families, operated on a completely segregated basis with white county agents servicing white clientele and a separate organization of black agents for black clientele.[113] When the segregated staffs were merged in 1965, all the black agents became subordinates of the white agents, and from 1965 to 1970 all employees appointed to county agent and extension home economist positions — the top county-level positions — were white.[114] After a trial, the district court found unlawful racial discrimination in hiring, promotions, job assignments, and other terms and conditions of employment, and prohibited further discrimination, but refused to order any affirmative hiring relief.[115]

Four years later, presented with evidence that its "don't-discriminate" decree was ineffective in increasing the number of blacks in professional and supervisory positions, the district court in 1978 ordered, subject to the availability of qualified applicants, one black hired for each white hired and one black promoted for each white promoted until the extension service was twenty percent black at all levels.[116] The *Wade* case also is significant because it was one of the first employment discrimination cases in which the federal courts approved the use of sophisticated statistical methods, including regression analysis, to measure discrimination in job performance evaluations and salaries.[117]

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[113] Wade v. Mississippi Cooperative Extension Service, 372 F. Supp. 126, 132 (N.D. Miss. 1974).

[114] *Id.* at 132-33.

[115] *Id.* at 139-47.

[116] Wade v. Mississippi Cooperative Extension Service, Civ. No. EC 70-29-K (N.D. Miss. Aug. 11, 1978)(Revised Supplemental Order).

[117] *Wade*, 528 F.2d at 516-18; *see* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 174-76 (1976) (*Wade* demonstrated discrimination in job performance evaluations and pay raises); Note, *Beyond the Prima Facie Case in Employment Discrimination Law: Statistical Proof and Rebuttal*, 89 HARV. L. REV. 387 (1976) (increasing use of

D. *The Necessity of Race-Conscious Relief*

Although court decrees requiring quota hiring and promotions and other forms of affirmative hiring relief have come under criticism, including attacks by the Reagan Administration, they have consistently been affirmed by the Supreme Court when necessary to overcome the effects of past discrimination and to provide equal employment opportunities for minority citizens and women.[118] The history of constitutional employment discrimination litigation in Mississippi shows that this relief in many cases is necessary to overcome the numerous barriers employers can erect to prevent the hiring or promotion of qualified black employees even after the employers have been ordered to stop discriminating.

E. *The Impact of Efforts to Eliminate Racial Discrimination in Employment*

The passage of federal legislation prohibiting racial discrimination in employment and enforcement efforts through voluntary conciliation and litigation, along with the other changes that have taken place since 1965 — including the greater urbanization and industrialization of the state and better educational opportunities — have resulted in relative economic progress for blacks. Black workers have moved out of low-paying farm and service worker positions into better-paying blue collar and white collar jobs. This also has resulted in income gains for blacks compared with whites. In 1960, black family income was only one-third of white family income; by 1980 black median family income increased to fifty-two percent of white family income and is approaching the national figure. In 1960, eighty-three percent of all black families lived below the poverty level; by 1980

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statistics to prove discrimination).

[118] *See, e.g.*, Johnson v. Transportation Agency, 480 U.S. 616 (1987) (affirmative action plan to hire women held non-violative of Title VII); United States v. Paradise, 480 U.S. 149, 185 (1987) (Alabama affirmative action plan to hire black highway patrol officers upheld); Sheet Metal Workers v. EEOC, 478 U.S. 421, 482-83 (1986) (affirmative action plan to hire non-whites upheld); *But see*, Wygant v. Jackson Board of Education, 476 U.S. 267, 283-84 (1986) (layoff provision favoring retention of minorities over more experienced whites held violation of equal protection clause).

that diminished to thirty-nine percent.[119] The gains that have been made should not be overstated, however; black poverty and economic deprivation remain critically serious problems for the state.

IV. Conclusion

David Garrow once remarked:

> Perhaps the greatest breakthrough that the movement of the '60's represented was in its progression from the superbly-conducted, elite-oriented tradition of seeking civil rights progress through the federal courts to mass political action that featured both protest demonstrations and grassroots electoral activism.[120]

The above survey indicates that once the mass protest movement of the 60's succeeded in persuading Congress to pass the Civil Rights Act of 1964 and the Voting Rights Act of 1965, the civil rights movement was required once again to revert to the federal courts to effectuate the constitutional and statutory civil rights of black Americans. Protest demonstrations and grassroots electoral activism simply were insufficient to overcome racial gerrymandering and at-large elections, rigidly segregated public schools, and an all-white highway patrol.

The constitutional-based civil rights litigation of the late 1960's and early 1970's responded to real human needs. Seth Ballard, a black community leader in Jefferson County, was prevented from running for county school superintendent when the Mississippi Legislature abolished elections for the position;[121] black parents in Jackson wanted a better education for their children;[122] and Charlie Wade in Holmes County was fully qualified to be county agent but his county board of supervisors would not accept a black person in the position.[123]

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[119] U.S. Bureau of the Census, 1960 Census of the Population 26-362 (1960) (the median income of white Mississippians 14 and over was $2,028, and the same median income for black Mississippians was $724); U.S. Bureau of the Census, 1980 Census of the Population 26-466 (1980) (the median income of white Mississippi families was $17,264, and for black Mississippi families the median income was $9,013). U.S. Bureau of the Census, 1980 Census of the Population 26-540 (1980)(39.0 percent of black family householders reported below specified poverty level in 1979).

[120] Address by David Garrow, Twenty Years Later: New Myths About the Movement 7, Joint Center for Political Studies Conference, "*The Civil Rights Act: Two Decades Later*" (June 28, 1984).

[121] *Bunton, supra* note 30, at 918.

During this period, civil rights litigation dramatically altered the governmental, educational, and employment structures of Mississippi, and the impact of those changes are still being felt today. What were the critical elements that produced this litigation and led to those changes? First, it required a black community leadership alert to the discrimination to which black citizens were being subjected and persevering enough to carry through years of litigation and appeals to higher courts until success finally was achieved.

Second, it required lawyers with the skills and legal talent to devise new legal strategies and to overcome scores of adverse decisions at the district court level in Mississippi from District Judge Harold Cox and his associates to win on appeal either to the Fifth Circuit or the United States Supreme Court. That many of the landmark decisions were Mississippi cases is no accident. Largely as a result of the Mississippi Freedom Summer of 1964 and the high level of civil rights work in the state, three national civil rights legal organizations — the NAACP Legal Defense Fund, the Lawyers Constitutional Defense Committee, and the Lawyers' Committee for Civil Rights Under Law — established full-time, staffed offices in Jackson in 1964 and 1965 to litigate civil rights cases and to support the work of a handful of courageous black lawyers.[124] No other state in the South during this period had such a large critical mass of outside legal talent based in the state to litigate such complex and expensive federal court lawsuits.

Third, it required federal judges who were sensitive and responsive to the legal claims of black citizens.[125] There is nothing in the express language of the fourteenth or fifteenth amendments that says that black voters have a right to elect candidates of their choice to the Mississippi Legislature in single-member legislative districts, that black school children have a right to be bused to integrated schools in the middle of the school year, or that black men and women have a right to be state troopers. Each of these cases required the application of the general principles of the post-Civil War amendments to the specific facts of the case. In each case, there were court precedents that could be construed as pointing the other way, and success depended upon federal judges responding to the fundamental injustice of racial discrimination.

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[122] Evers v. Jackson Municipal Separate School District, *supra* note 60.

[123] *Wade*, 528 F.2d at 518-19.

[124] *See*, GUIDE TO THE MICROFILM EDITION OF SOUTHERN CIVIL RIGHTS LITIGATION RECORDS FOR THE 1960'S (C. Vose, ed. 1980).

[125] *See, e.g.*, J. BASS, UNLIKELY HEROES (1981). In particular, the decisions of Circuit Judges Elbert Tuttle, John Brown, John Minor Wisdom, Irving Goldberg, Walter Gewin, John Godbold, and Charles Clark and, in Mississippi, District Judges William Keady and Orma Smith deserve special mention.

Fourth, the success of much of this litigation depended upon the formulation of new legal remedies, such as sixty-five percent black super-majority election districts, cross-town busing, and racial hiring and promotion quotas that produced some hostility on the part of whites but were necessary to produce these changes. Most southern federal judges at first were reluctant to impose these remedies, but became convinced of their necessity when less effective measures failed. While these remedies remain somewhat controversial today, it is important to remember that they were not derived from some abstract notion of social engineering, but emerged from the experience of scores of cases in which lesser solutions failed to eradicate the effects of past discrimination.

Despite the changes that have taken place, elements of the past persist in Mississippi. Voting in Mississippi elections remains racially polarized; most white voters generally continue to refuse to vote for black candidates, regardless of qualifications.[126] Openly racist rhetoric no longer prevails in political campaigns, but in some instances white voters continue to respond to the same messages in coded form.[127] Although the attitudes of most white Mississippians regarding integrated education have changed greatly, many of the segregation academies begun in the 1960's to avoid public school desegregation are flourishing today. In the 1987 election in which Mississippi's current progressive governor, Ray Mabus, was elected, the voters by statewide referendum finally repealed Mississippi's constitutional prohibition against interracial marriage,[128] but forty-eight percent of the voters voted in favor of retaining the ban even though it had long been declared unconstitutional by the United States Supreme Court. The changes that have been achieved provide a firm basis for future progress. Whether these changes will continue, or whether the society will regress, depends on future developments.

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[126] *See Martin*, 658 F.Supp. at 1193 (racially polarized voting exists in Mississippi); *Jordan*, 604 F. Supp. at 812 (Mississippi voters continually vote on basis of race of candidates).

[127] *See, e.g.*, *supra* note 27, at 408 (coded racial rhetoric in the 1982 Second Congressional District election).

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[128] MISS. CONST., art. XIV, § 263 (1890) (repealed 1987).

ENFORCING THE VOTING RIGHTS ACT IN MISSISSIPPI THROUGH LITIGATION

*Carroll Rhodes**

I. Introduction

The Voting Rights Act of 1965[1] (the Act) has been hailed as the "most effective civil rights legislation ever passed,"[2] and is grounded in the principle that the right to vote is the "crown jewel"[3] of our democracy and the most preservative of all of our rights.[4] Its effectiveness may be measured by the number of blacks and other protected minorities[5] who have registered to vote[6] and have been elected to public office because of the Act.[7] That effectiveness is the result of vigorous litigation[8] focusing on

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[1] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973 bb-1 (1982)).

[2] S. Rep. No. 295, 94th Cong., 1st Sess. 11, *reprinted in* 1975 U.S. Code Cong. & Admin. News 774, 777.

[3] President Ronald Reagan used this phrase at the signing ceremony for the 1982 extension and amendment of the Voting Rights Act of 1965. 18 Weekly Comp. Pres. Doc. 846 (June 29, 1982).

[4] Yick Wo. v. Hopkins, 118 U.S. 356, 370 (1886).

[5] The legislative history of the Voting Rights Act of 1965 and court cases interpreting the Act show that Congress intended to extend the protection of the Act to blacks and language minorities. *See* McDaniel v. Sanchez, 452 U.S. 130, 133 (1981) (Mexican Americans protected); White v. Regester, 412 U.S. 755, 769 (1973) (same); Georgia v. United States, 411 U.S. 526, 529 (1973) (blacks protected); Perkins v. Matthews, 301 F. Supp. 565 (S.D. Miss. 1969), *rev'd*, 400 U.S. 379, 389 (1971) (based on findings of 18-month study of operation of Act by U.S. Civil Rights Commission, Commission's director reported to Congress that gerrymandering and boundary changes had become prime weapons for discriminating against Negro voters); Gaston County v. United States, 395 U.S. 285, 293 (1969) (blacks protected by § 4 of Act); Allen v. Board of Elections, 393 U.S. 544, 548 (1969) (not underestimating ingenuity of those bent on preventing Negroes from voting, Congress enacted § 5); Katzenbach v. Morgan, 384 U.S. 641, 652 (1966) (language minorities protected by § 4 (e) of Act); South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966) (Act was designed by Congress to banish blight of racial discrimination in voting); Buckanaga v. Sisseton Ind. School Dist., No. 54-5, 804 F.2d 469, 474 (8th Cir.

1986) (citizens of American Indian descent are protected by Act); Chinese for Affirmative Action v. Leguennec, 580 F.2d 1006, 1011 (9th Cir. 1978) (Chinese Americans protected by Act), *cert. denied*, 439 U.S. 1129 (1979); S. REP. No. 417, 97th Cong., 2d Sess. 6, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 182 (Congress hoped that passage of Act would defeat voting discrimination against blacks); S. REP. No. 295, 94th Cong., 1st Sess. 8, *reprinted in* 1975 U.S. CODE CONG. & ADMIN. NEWS 774, 782 (purpose of 1975 amendment of Act was to expand coverage of Act to include "jurisdictions in which language minorities reside"); H.R. REP. No. 397, 91st Cong., 2d Sess. 5, *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 3277, 3281 (when Act was enacted in 1965, Congress expected that within five years Negroes would have gained sufficient voting power in affected states so that special federal protection would no longer be needed); H.R. REP. No. 439, 89th Cong., 1st Sess. 1, *reprinted in* 1965 U.S. CODE CONG. & ADMIN. NEWS 2437, 2437 (one purpose of legislation was to abolish devices which denied "right to vote on account of race or color"); Hunter, *The 1975 Voting Rights Act and Language Minorities*, 25 CATH. U.L. REV. 250, 251 (1976) (Act enacted to protect voting rights of blacks and other minorities since litigation and prior legislation had failed).

[6] As Congress noted in the 1975 extension of the Act, "registration rates for blacks in the covered southern jurisdictions have continued to increase since the passage of the Act. For example, while only 6.7 percent of the black voting age population of Mississippi was registered before 1965, 63.2 percent of such persons were registered in 1971-72. Similar dramatic increases in black registration can be observed in Alabama, Georgia, Louisiana, and Virginia." S. REP. No. 295, 94th Cong., 1st Sess. 13, *reprinted in* 1975 U.S. CODE CONG. & ADMIN. NEWS 774, 779. Experts and courts agree that black voter registration has increased because of the Act. However, there is some discrepancy as to how much increase there has been since the Act's effective date. *Compare* Lewis & Allen, *Black Voter Registration Efforts in the South*, 48 NOTRE DAME LAW. 105, 119 (1972) (as of August, 1972, it was estimated that 59.37% of Mississippi's black voting age population was registered) *with* Mississippi State Chapter, Operation Push v. Allain, 674 F. Supp. 1245, 1255 (N.D. Miss. 1987) (currently 54% of black voting age population in Mississippi is registered to vote compared to 79% of white voting age population) *and* Comment, *Mississippi and the Voting Rights Act: 1965-1982*, 52 MISS. L. J. 803, 803 n.3 (1982) [hereinafter Comment, *Mississippi*] (in 1980, 72.2% of Mississippi's black voting age population registered to vote).

[7] Several thousand blacks and other protected minorities have been elected to public office as a result of the Voting Rights Act of 1965. 12 JOINT CENTER FOR POLITICAL STUDIES, NATIONAL ROSTER OF BLACK ELECTED OFFICIALS (1988). In Mississippi alone, there are 521 elected black public officials. *Mississippi State Chapter, Operation Push*, 674 F. Supp. at 1265.

[8] Indicative of the vigorousness of the litigation is the plethora of voting rights cases decided by the United States Supreme Court after the Act's passage which includes: City of Pleasant Grove v. United States, 479 U.S. 462 (1987); Davis v. Bandemer, 478 U.S. 109 (1986); Thornburg v. Gingles, 478 U.S. 30 (1986); NAACP v. Hampton County Election Comm'n, 470 U.S. 160 (1985); McCain v. Lybrand, 465 U.S. 236 (1984); Lockhart v. United States, 460 U.S. 125 (1983); City of Port Arthur v. United States, 459 U.S. 159 (1983); Hathorn v. Lovorn, 457 U.S. 255 (1982); Upham v. Seamon, 456 U.S. 37 (1982); Blanding v. Dubose, 454 U.S. 393 (1982); McDaniel v. Sanchez, 452 U.S. 130 (1981); City

two primary areas: (1) gaining access to the ballot[9] and (2) gaining access to political office[10] as well as public policies that are established by popular vote.[11]

In Mississippi, one of the states to which the Act's extraordinary federal remedy was directed,[12] the Act has been en-

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of Rome v. United States, 446 U.S. 156 (1980); Mobile v. Bolden, 446 U.S. 55 (1980); Dougherty County Bd. of Educ. v. White, 439 U.S. 32 (1978); Berry v. Doles, 438 U.S. 190 (1978); Wise v. Lipscomb, 437 U.S. 535 (1978); United States v. Board of Comm'rs, 435 U.S. 110 (1978); Morris v. Gressett, 432 U.S. 491 (1977); Brisco v. Bell, 432 U.S. 404 (1977); Connor v. Finch, 431 U.S. 407 (1977); United Jewish Orgs., Inc. v. Carey, 430 U.S. 144 (1977); United States v. Board of Supervisors, 429 U.S. 642 (1977); Beer v. United States, 425 U.S. 130 (1976); East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976); Richmond v. United States, 422 U.S. 358 (1975); Connor v. Waller, 421 U.S. 656 (1975); NAACP v. New York, 413 U.S. 345 (1973); White v. Regester, 412 U.S. 755 (1973); Georgia v. United States, 411 U.S. 526 (1973); Perkins v. Matthews, 301 F. Supp. 565 (S.D. Miss. 1969), *rev'd* 400 U.S. 379 (1971); Gaston County v. United States, 395 U.S. 285 (1969); Hadnott v. Amos, 394 U.S. 358 (1969); Allen v. State Bd. of Elections, 393 U.S. 544 (1969); Cardona v. Power, 384 U.S. 672 (1966); Katzenbach v. Morgan, 384 U.S. 341 (1966); South Carolina v. Katzenbach, 383 U.S. 301 (1966).

[9] As one commentator noted, "[T]he first step in extending meaningful political power to blacks was elementary: they had to obtain access to the ballot." Frickey, *Judge Wisdom and Voting Rights: The Judicial Artist as Scholar and Pragmatist*, 60 TUL. L. REV. 276, 278 (1985). *See generally* United States v. Mississippi, 380 U.S. 128, 130 (1965) (detailing difficulty blacks had in obtaining access to ballot prior to passage of Voting Rights Act); United States v. Lynd, 321 F.2d 26, 28 (5th Cir. 1963) (same), *cert. denied* 375 U.S. 968 (1964); United States v. Dogan, 314 F.2d 767, 769 (5th Cir. 1963) (same). Consequently, the Voting Rights Act was enacted in 1965 to give protected minorities access to the ballot. H.R. REP. No. 439, 89th Cong., 1st Sess. 1, *reprinted in* 1965 U.S. CODE CONG. & ADMIN. NEWS 2437, 2437. Section 5 of the Act has been the main provision utilized to obtain the ballot. *See, e.g.*, Pendleton v. Heard, 824 F.2d 448, 451 (5th Cir. 1987) (recent case in which protected minorities sought access to ballot).

[10] Section 2 of the Act has been utilized primarily to gain access to political office. 42 U.S.C. § 1973 (1982). *See* Zimmer v. McKeithen, 485 F.2d 1297, 1299 (5th Cir. 1973) (*en banc*) (action to gain access to political office based on § 2 of Act), *aff'd on other grounds sub nom.*, East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976); Connor v. Waller, 421 U.S. 656, 661 (1975) (same); Kirksey v. Board of Supervisors, 402 F. Supp. 658 (S.D. Miss. 1975), *aff'd*, 528 F.2d 536 (5th Cir. 1976), *rev'd on reh'g*, 554 F.2d 139, 141 (5th Cir.) (same), *cert. denied*, 434 U.S. 968 (1977); Martin v. Allain, 658 F. Supp. 1183, 1185 (S.D. Miss. 1987) (same).

[11] Recently, for example, suit was filed to give blacks access to school bonds by having Mississippi's 60% voter approval requirement for the issuance of bonds declared violative of § 2 of the Act. Armstrong v. Allain, No. J86-0817 (L) (S.D. Miss. 1986).

[12] Remedies available under the Act, although labeled as "extraordinary," have been recognized as necessary for jurisdictions where "federal courts have repeatedly found substantial voting discrimination." South Carolina v. Katzenbach, 383 U.S. 301, 329 (1966). *See also*, Allen v. State Bd. of Elections, 393 U.S. 544, 548 (1969) (§ 5 provides needed protection for Negro voters); Roman, *Section 5 of the Voting Rights Act: The*

forced principally through litigation.[13] The thrust of this litigation has been to give blacks access to the ballot and public office.[14] This article will review the private enforcement litigation history of the Act in Mississippi with an emphasis on current litigation trends.

II. HISTORY OF LITIGATION UNDER SECTIONS TWO AND FIVE OF THE ACT

A. *Early Litigation: 1965-1975*

Early litigation under the Act was primarily aimed at striking down barriers to registration[15] and voting. In *United States v. Mississippi*,[16] a district court ordered state election officials to place the names of voters who had been certified by federal voting examiners as being eligible to vote on the poll books.[17] *Whitley v. Johnson*[18] followed shortly thereafter and was aimed at giving blacks access to the ballot by ensuring that their names

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Formation of an Extraordinary Federal Remedy, 22 AM. U.L. REV. 111, 111-113 (1972) (preclearance under Act necessary to protect against voter discrimination); Starr, *Federal Judicial Invalidation as a Remedy for Irregularities in State Elections*, 49 N.Y.L. REV. 1092, 1127-28 (1974) (new election remedy reasonable and strong deterrent to discrimination).

[13] For examples of litigation in Mississippi, see Parker, *County Redistricting in Mississippi: Case Studies in Racial Gerrymandering*, 44 MISS. L.J. 391, 394-400 (1973) [hereinafter Parker, *County Redistricting*]; Parker, *The Mississippi Congressional Redistricting Case: A Case Study in Minority Vote Dilution*, 28 HOW. L.J. 397, 400 (1985) [hereinafter Parker, *Vote Dilution*]; Comment, *Mississippi, supra* note 6, at 803.

Section 5 of the Act may be enforced administratively if the covered jurisdiction voluntarily submits post-coverage voting changes to the U.S. Attorney General for preclearance. 42 U.S.C. § 1973 (c). *See also*, 28 C.F.R. 51.1 to 51.67 (procedures for administration of § 5). The covered jurisdiction may also obtain a declaratory judgment from the United States District Court for the District of Columbia that the proposed change is absent a discriminatory purpose or effect. City of Port Arthur v. United States, 459 U.S. 159, 161 (1983); Lockhart v. United States, 460 U.S. 125, 128-29 (1983).

[14] *See supra* notes 6-7 and accompanying text.

[15] *See* United States v. McClellan, 248 F. Supp. 62, 63 (S.D. Miss. 1965) (enforcement action brought by U.S. Attorney General under 42 U.S.C. § 1971(d) to strike down racially discriminatory election laws and practices in effect in Mississippi in 1965); *see also* Hamer v. Campbell, 358 F.2d 215, 219 (5th Cir. 1966) (class action suit to set aside election was proper where registration practices were violative of Act).

[16] 256 F. Supp. 344 (S.D. Miss. 1966).

[17] *Mississippi*, 256 F. Supp. at 349.

[18] 260 F. Supp. 630 (S.D. Miss. 1966) (*per curiam*), *rev'd*, Allen v. Board of Elections, 393 U.S. 544, 572 (1972).

could appear as candidates on the ballot.[19] *Bunton v. Patterson*[20] and *Fairley v. Patterson*,[21] filed during the same time period, were equally concerned with giving blacks access to the ballot. *Bunton v. Patterson*[22] was aimed at ensuring that elected positions remained elected and *Fairley v. Patterson*[23] concerned the halting of a voting change from district to at-large. *Whitley*, *Bunton*, and *Fairley* were ultimately ruled upon by the United States Supreme Court in *Allen v. State Board of Elections*.[24] In *Allen*, the Supreme Court held that section 5[25] scrutiny should be applied to actions taken by covered jurisdictions[26] seeking to enact[27] changes in existing election laws,[28] in even a minor way.[29] Thus, the Court interpreted section 5 broadly, holding that it "was aimed to the subtle, as well as the obvious"[30] voting changes that could have a discriminatory purpose or effect.[31]

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[19] *Whitley*, 260 F. Supp. at 630. *Whitley* was predicated on § 5 of the Act and the court ordered the names of black independent candidates be placed on the ballot. *Id.* However, the court later held that preclearance of the statute was not required since the statute concerned candidates and not voters. *Whitley v. Johnson*, 296 F. Supp. 754, 754 (S.D. Miss. 1967) (*per curiam*). This decision was overruled in *Allen*. *Allen*, 393 U.S. at 572.

[20] 281 F. Supp. 918 (S.D. Miss. 1967), *rev'd* Allen v. Board of Elections, 393 U.S. 544, 572 (1969).

[21] 282 F. Supp. 164 (S.D. Miss. 1967), *rev'd* Allen v. Board of Elections, 393 U.S. 544, (1969).

[22] 281 F. Supp. 918 (S.D. Miss. 1967).

[23] 282 F. Supp. 164 (S.D. Miss. 1967).

[24] 393 U.S. 544 (1969).

[25] 42 U.S.C. § 1973 (c) (1982).

[26] Currently, nine states and parts of seven others are covered by § 5 of the Act. *Appendix-Jurisdictions Covered Under Section 4(b) of the Voting Rights Act, as amended* 28 C.F.R. § 51 (1988). These states are: Alabama, Alaska, Arizona, California, Florida, Georgia, Louisiana, Michigan, Mississippi, New Hampshire, New York, North Carolina, South Carolina, South Dakota, Texas, and Virginia. *Id.*

[27] Enactment occurs when the elected representatives of the people make policy choices about election practices which affect existing practices, in even a minor way. Hathorn v. Lovorn, 457 U.S. 255, 265 n.16 (1982); McDaniel v. Sanchez, 452 U.S. 130, 153 (1981).

[28] *Hathorn*, 457 U.S. at 265 n.16. Existing election laws include those election practices which were in fact in force or in effect on the effective date of coverage under the Act. *Id.*

[29] *Allen*, 393 U.S. at 566.

[30] *Id.* at 565.

[31] *Id.* For a recent case affirming the scope given § 5 in *Allen*, see City of Pleasant Grove v. United States, 479 U.S. 462, 467 (1987). *See also* Perkins v. Matthews, 301 F. Supp. 565 (S.D. Miss. 1969), *rev'd* 400 U.S. 379, 388-89 (1971) (§ 5 was designed to cover

More importantly, the Court held that private parties could bring enforcement actions under section 5.[32] The holding in *Allen* was reaffirmed in *Perkins v. Matthews*.[33] Thus, blacks in Mississippi, with the status of private attorney generals, commenced vigorous enforcement efforts after *Allen*.[34] Initially, these enforcement efforts were aimed at gaining access to the ballot.[35] It seemed senseless to concentrate efforts on gaining access to office until it was assured that blacks could vote in elections without having their voting strength diluted.[36] Indeed, pervasive and extreme racial bloc voting was, and still is, the rule by which Mississippi elections were determined.[37] It was generally assumed that whites in Mississippi would not vote for black candidates in significant numbers.[38] Consequently, without the white votes necessary to win elections, black candidates had to have substantial numbers of black citizens registered to vote in order to be successful. Therefore, initial enforcement efforts were directed at putting a racially undiluted ballot[39] in the

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changes having potential for racial discrimination in voting).

[32] *Allen*, 393 U.S. at 557.

[33] 301 F. Supp. 565 (S.D. Miss. 1969), *rev'd* 400 U.S. 379, 382 (1971).

[34] *See supra* note 13 and accompanying text. Section 12(d) of the Act authorizes the United States Attorney General to bring enforcement actions. 42 U.S.C. § 1973 (d) (1982); 28 C.F.R. § 51.62.

[35] *See* Comment, *Mississippi*, *supra* note 6, at 813-14 (initial litigation clarified scope of voting changes covered by Act).

[36] H.R. REP. NO. 397, 91st Cong., 2d Sess. 4, *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 3277, 3280. Prior to enactment of the Voting Rights Act of 1965, only 6.7% of "nonwhites" were registered to vote. However, after vigorous voter registration efforts by the federal government and civil rights agencies after the Act's passage , it was estimated that 59.3% of "nonwhites" were registered while 92.4% of whites were registered. *Id.*

[37] Martin v. Allain, 658 F. Supp. 1183, 1193-94 (S.D. Miss. 1987).

[38] *See* Mississippi v. United States, 490 F. Supp. 569, 570 (D.C. Cir. 1979) (continuing effect of past discrimination resulted in lower black voter participation and because of racial bloc voting blacks had to have 65% of district's population to have chance to win), *aff'd*, 444 U.S. 1050 (1980).

[39] After passage of the Act, the states began to enact new barriers to blacks seeking to cast effective votes. Congress, in amending § 2 in 1982, chronicled some of those dilutionary measures:

> Following the dramatic rise in registration, a broad array of dilution schemes were employed to cancel the impact of the new black vote. Election boundaries were gerrymandered; majority runoffs were instituted to prevent victories under a prior plurality system; at-large elections were substituted for election by single-member districts, or combined with other sophisticated rules to pre-

hands of Mississippi's black voters.[40] Undaunted by the Supreme Court's liberal interpretation of section 5 in *Allen* and increased private enforcement efforts by blacks, the State of Mississippi obstinately refused to comply with section 5's scrutiny requirements.[41]

The state's political subdivisions were equally recalcitrant in complying with section 5's requirements.[42] An example of that recalcitrance was the city of Canton. Despite the Supreme Court's broad interpretation in *Allen*, Canton maintained that a voting change from ward to at-large elections was not discriminatory and, therefore, did not fall within the purview of section 5 scrutiny.[43] The district court found the changes nondiscriminatory, and the black voters appealed to the Supreme Court.[44] The Supreme Court reaffirmed its holding in *Allen* that changes from district or ward to at-large elections were covered by section 5,[45] and further held that annexations of territory and polling place changes fell within the Act's coverage.[46]

Like Mississippi municipalities, county boards of supervi-

> vent an effective minority vote. The ingenuity of such schemes seems endless. Their common purpose and effect has been to offset the gains made at the ballot box under the Act.

S. Rep. No. 417, 97th Cong., 2d Sess. 6, *reprinted in* 1982 U.S. Code Cong. & Admin. News 177, 183.

[40] *Allen*, 393 U.S. at 563-64. *See also* Perkins v. Matthews, 301 F. Supp. 565 (S.D. Miss. 1969), *rev'd* 400 U.S. 379, 387-88 (1971) (lack of accessibility, prominence, facilities, and prior notice of polling place have potential of denying and diluting black votes).

[41] *See* Evers v. State Bd. of Election Comm'rs, 327 F. Supp. 640, 644 (S.D. Miss. 1971) (attorney general failed to affirmatively determine whether new election law denied right to vote, thus, law could not take effect).

[42] S. Rep. No. 417, 97th Cong., 2d Sess. 12, *reprinted in* 1982 U.S. Code Cong. & Admin. News 177, 189. The legislative history to the 1982 amendment and extension of the Act acknowledged Congress' awareness of recalcitrant political subdivisions in complying with § 5. *Id.*

[43] Perkins v. Matthews, 301 F. Supp. 565 (S.D. Miss. 1969), *rev'd* 400 U.S. 379, 386 (1971).

[44] *Perkins*, 400 U.S. at 383. Direct § 5 enforcement actions are heard by three-judge panels in district courts with appeals going directly to the United States Supreme Court. 42 U.S.C. § 1973 (c) (1982); Holt v. City of Richmond, 459 F.2d 1093, 1095 (4th Cir. 1972), *cert. denied*, 408 U.S. 931 (1972). Section 5 issues raised collaterally in state court should follow state appellate routes, with ultimate review by the Supreme Court. Hathorn v. Lovorn, 457 U.S. 255, 267-70 (1982).

[45] *Perkins*, 400 U.S. at 390-94.

[46] *Id.* at 387-89.

sors obfuscated section 5's scrutiny requirements. Although a federal district court had held that changes from district to at-large elections of county supervisors were unenforceable until precleared pursuant to section 5 in *Dyer v. Love*,[47] the Leflore County Board of Supervisors sought to enforce a post-November 1, 1964[48] voting change without preclearance in *Moore v. Leflore County Board of Election Commissioners*[49]. Black voters in the county instituted a section 5 enforcement action in federal district court seeking an injunction against the voting change.[50] The district court stated:

> We agree with plaintiffs' basic contention that the board's 1966 order providing for at-large elections amounts to a voting standard, practice, or procedure different from that in force on November 1, 1964, and hence ineffective and unenforceable until the requisite approval has been secured from either the Attorney General of the United States or the United States District Court for the District of Columbia as required by section 5 of the Voting Rights Act of 1965 as amended. This proposition was settled by the Supreme Court in *Allen v. Board of Electors*, 392 U.S. 544, 89 S.Ct. 817, 22 L. Ed. 2d 1 (1969), which held that section 5 approval had to be secured before the 1966 amendment to Miss. Code Section 2870 could be implemented.[51]

The city of Canton and Leflore County were not atypical in their stern resistance to section 5 enforcement efforts.[52] Thirteen or more counties switched or attempted to switch from single-member to at-large voting for members of boards of supervisors, and twenty-two counties switched or attempted to switch from single-member to at-large elections for county school board members without preclearance.[53] During the period from 1965 to 1975, fifteen counties,[54] seven county boards of education[55] and five municipalities[56] had objections entered by the United States Attorney General to proposed or implemented voting changes.[57]

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[47] 307 F. Supp. 974, 976 (N.D. Miss. 1969).

[48] November 1, 1964 is the effective date of coverage of Mississippi and its political subdivisions under the Act. *Appendix - Jurisdictions Covered Under Section 4(b) of the Voting Rights Act, as Amended*, 28 C.F.R. § 51 (1987).

[49] 351 F. Supp. 848 (N.D. Miss. 1971).

[50] *Moore*, 351 F. Supp. at 849.

[51] *Id.* at 850-51.

[52] *See* UNITED STATES COMMISSION ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER (1975); § 5 objection letters from J. Stanley Pottinger, Asst. Att'y Gen., Civil Rights Division, U.S. Department of Justice, to John L. Hatcher, Attorney for the Bolivar County Board of Election Commissioners (April 8, 1975); W.H. Jolly, Sr., attorney for the Lowndes County Board of Education (June 23, 1975); and A.F. Summer, Mississippi State Attorney General (Dec. 1, 1975); letter from Drew S. Days, Asst. Att'y Gen., Civil Rights Division, U.S. Dept. of Justice, to A.F. Summer (July 8, 1977).

In addition to having objections entered to state-enacted voting changes, the state had also failed to timely submit more than 300 post-November 1, 1964 voting changes for section 5 review.[58] As Congress noted in the legislative history to the 1982 amendment and extension of the Act,[59] "there has been continued widespread failure to submit proposed changes in election laws for section 5 review before attempting to implement the changes."[60] Since the 1965 effective date, as many as "750 state enactments affecting voting have been passed by state legislatures" in six Southern states without being submitted for section 5 scrutiny.[61] One of those states was Mississippi.[62] Despite Mississippi's recalcitrance in the enforcement of and compliance with section 5 of the Voting Rights Act, black Mississippians have been relatively successful in their private enforcement efforts.[63]

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[53] LAWYER'S COMMITTEE FOR CIVIL RIGHTS UNDER LAW, VOTING IN MISSISSIPPI: A RIGHT STILL DENIED 34 (1981) [hereinafter VOTING IN MISSISSIPPI]

[54] *Roster of Objections for the State of Mississippi Maintained by United States Attorney General.* The counties which had objections entered against them by the Attorney General and the voting changes to which the objections were entered were: Copiah (redistricting), Leake (redistricting), Warren (polling place, redistricting), Marion (redistricting), Jasper (re-registration), Grenada (redistricting, at-large elections, multi-member plan, numbered posts), Attala (numbered posts, at-large elections, redistricting), Hinds (redistricting), Lafayette (polling place), Yazoo (redistricting), Tate (redistricting, precinct lines, polling places), Marshall (precinct lines, polling places), and Clay (polling places). *Id. See also*, Comment, *Mississippi, supra* note 6, at 835-36 n. 222 (list of objections filed from 1965 through June 30, 1982).

[55] *Roster of Objections, supra* note 54. The board of education districts in which the Attorney General entered objections were: Bolivar County (district to at-large elections), Lowndes County (district to at-large elections), State (includes Kemper, Warren, Marshall, Benton, and Leake counties under MISS. CODE ANN. § 37-5-13 (1972)) (district to at-large elections). *Roster of Objections, supra* note 54.

[56] *Roster of Objections, supra* note 54. The five municipalities to which the Attorney General made objections were Grenada, Indianola, Hollandale, Pearl, and Shaw. *Id.*

[57] *Id.*

[58] Kirksey v. Pittman, No. J86-0558 (B) (S.D. Miss. filed August 12, 1986). *Kirksey* was a § 5 enforcement action brought by black Mississippi voters, Henry Kirksey, Ben F. Burkett, Monzell Stowers, and George McGee, seeking declaratory and injunctive relief against implementation of unprecleared voting changes. After the enforcement action was filed, the state submitted and obtained preclearance for many of the changes challenged in *Kirksey.* Letter from William Bradford Reynolds, Asst. Att'y Gen., to Edwin Lloyd Pittman, Mississippi State Att'y Gen. (Oct. 6, 1986);letter from Reynolds to Pittman (Oct. 10, 1986); letter from Reynolds to Pittman (Oct. 24, 1986); letter from Reynolds to Pittman (Oct, 27, 1986); two letters from Reynolds to Pittman (Nov. 7, 1986); two letters from Reynolds to Pittman (Dec. 2, 1986); letter from Reynolds to Pittman (Dec. 5, 1986); letter from Reynolds to Pittman (Dec. 11, 1986); letter from Reynolds to Pittman (Dec. 15, 1986); three letters from Reynolds to Pittman (Dec. 17, 1986); letter from Reynolds to Pittman (Dec. 31, 1986); letter from Reynolds to Pittman (Jan. 2 1987); letter from Reynolds to Pittman (Feb. 20, 1987); letter from Reynolds to Pittman (Feb.

However, not all initial enforcement efforts were based on section 5. Soon after the success of section 5 enforcement efforts in striking down some barriers to registration and voting,[64] black voters brought enforcement efforts under the fourteenth and fifteenth amendments to the United States Constitution as well as section 2 of the Act[65] in an effort to elect blacks[66] to public of-

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23, 1987); two letters from Reynolds to Pittman (Mar. 2, 1987); letter from Reynolds to Pittman (Nov. 13, 1987); letter from Reynolds to Pittman (Dec. 28, 1987); letter from Reynolds to Pittman (Dec. 29, 1987); letter from Reynolds to Pittman (Dec. 31, 1987); three letters from Reynolds to Mike Moore, Mississippi State Att'y Gen. (Jan. 15, 1988); letter from Reynolds to Moore (Jan. 19, 1988); letter from Reynolds to Moore (Apr. 18, 1987).

The United States Attorney General requested that the Mississippi State Attorney General supply additional information with respect to the appointment of superintendents of education by certain counties. Letter from William Bradford Reynolds, Asst. Att'y Gen., to Edwin Lloyd Pittman, Mississippi State Att'y Gen. (Sept. 21, 1987).

[59] *See* Voting Rights Act Amendment of 1982, Pub. L. No. 97-205, §§ 1-5, 96 Stat. 131 (amending 42 U.S.C. § 1973 (1976)); S. REP. No. 417, 97th Cong., 2d Sess. 1, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 177-410 (legislative history of 1982 Amendment to Voting Rights Act).

[60] S. REP. No. 417, 97th Cong., 2d Sess. 12, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 189.

[61] *Id.*, 1982 U.S. CODE CONG. & ADMIN. NEWS at 189.

[62] *Id.* at 13, 1982 U.S. CODE CONG. & ADMIN. NEWS at 190.

[63] *See generally*, Parker, *County Redistricting*, *supra* note 13, at 393 (registered voters increased by 21% from 1964 to 1971 due to successful litigation); Parker, *Vote Dilution*, *supra* note 13, at 400 (private litigation successful in gaining access to ballot); Comment, *Mississippi*, *supra* note 6, at 875 (minority voters made progress as "political force" in both state and local elections).

[64] *See generally*, *Allen*, 393 U.S. at 566 (barriers to registration and voting struck down); *Perkins*, 400 U.S. at 388-89 (same).

[65] 42 U.S.C. § 1973 (1982). At the time these enforcement actions were brought to gain access to political office, voting rights litigants perceived the standard of proof to be

fice, namely legislative offices.[67] However, voting rights litigants soon found that achieving this goal was much harder than overcoming barriers to ballot access.[68] *Connor v. Coleman*[69], Mississippi's fourteen year legislative reapportionment case, was a prime example of vigorous enforcement stonewalled by ingenious barriers to access to political office.[70] *Connor*, initiated in 1965, was argued before two three-judge panels and reached the United States Supreme Court nine times[71] before it was decided that blacks should have an opportunity to elect more than one state legislator.[72] When the litigation commenced, there were no

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the same under the fourteenth and fifteenth amendments and § 2 of the Act. *See* White v. Regester, 412 U.S. 755, 760 (1973) (standard of proof under both thought to be same); Zimmer v. McKeithen, 485 F.2d 1297, 1301 (5th Cir. 1973) (*en banc*) (same), *aff'd on other grounds sub. nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976); Kirksey v. Board of Supervisors, 402 F. Supp. 658, (S.D. Miss. 1975), *aff'd*, 528 F.2d 536 (5th Cir. 1976) *rev'd on reh'g*, 554 F.2d 139, *cert. denied*, 434 U.S. 968 (1977); Blacksher & Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden*, 34 HASTINGS L.J. 1, 10 (1982) (same); Bonapfel, *Minority Challenges to At-Large Elections: The Dilution Problem*, 10 GA. L. REV. 353, 361 (1976) (same); Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 523 (1977); Comment, *Vote Dilution Challenges After Washington v. Davis*, 30 ALA. L. REV. 396, 400 (1979) (same).

[66] Blacks are the predominant minority population protected by the Act in Mississippi. *See supra* note 5 and accompanying text.

[67] Enforcement efforts, which were aimed at gaining access to political office, targeted boards of supervisors, boards of aldermen, state legislative seats, and boards of education. *See, e.g.*, Howard v. Adams County Bd. of Supervisors, 480 F.2d 978, 979 (5th Cir. 1973), *cert. denied*, 415 U.S. 975 (1974) (boards of supervisors); Howard v. Adams County Bd. of Supervisors, 453 F.2d 455, 456 (5th Cir.), *cert. denied*, 407 U.S. 925 (1972) (same); Taylor v. Monroe County Bd. of Supervisors, 421 F.2d 1038, 1039 (5th Cir. 1970) (same); Canton Branch, NAACP v. City of Canton, 472 F. Supp. 859, 860 (S.D. Miss. 1978) (board of aldermen); Kirksey v. City of Jackson, 461 F. Supp. 1282, 1284 (S.D. Miss. 1978) (same), *vacated and remanded*, 625 F.2d 21 (5th Cir. 1980); Matthews v. Leflore County Bd. of Election Comm'rs, 450 F. Supp. 765, 767 (N.D. Miss. 1978) (board of education); Kirksey v. Board of Supervisors, 402 F. Supp. 658, 660 (S.D. Miss. 1975) (board of supervisors), *aff'd*, 528 F.2d 536 (5th Cir. 1976), *rev'd, on reh'g*, 554 F.2d 139 (5th Cir.), *cert. denied*, 434 U.S. 968 (1977); Connor v. Waller, 396 F. Supp. 1308 (S.D. Miss.), *rev'd*, 421 U.S. 656, 656 (1975) (state legislative seats); United States v. Bolivar County, No. DC 75-521c (N.D. Miss. filed March 29, 1976) (board of education).

[68] *See supra* note 38 and accompanying text.

[69] 440 U.S. 612 (1979).

[70] *See* Comment, *Mississippi*, *supra* note 6, at 834-42 (excellent outline of state's reapportionment litigation history); Connor v. Waller, 396 F. Supp. 1308, 1309 (S.D. Miss. 1975) (example of litigation involving reapportionment), *rev'd*, 421 U.S. 656 (1975).

[71] Comment, *Mississippi*, *supra* note 6, at 835.

[72] Connor v. Winter, 519 F. Supp. 1337, 1340 (S.D. Miss. 1981).

black legislative members. Robert Clark, the first black state representative since Reconstruction, was elected to the Mississippi House of Representatives in 1967[73] and remained the only black legislator until 1975 when three additional blacks were elected.[74] In 1979, the number of blacks elected to the legislature rose to fifteen.[75] Today, twenty blacks serve in the House and two in the Senate[76] although blacks comprise 35% of the state's population.[77] Mississippi's black voters encountered equally high hurdles in obtaining access to congressional offices. *Connor v. Johnson*,[78] initiated in 1966, took twenty years before accomplishing its goal of allowing a black Mississippian to enter the halls of Congress for the first time since Reconstruction.[79] Michael Espy, a young, articulate, and intelligent attorney with deep roots in the state's second congressional district,[80] narrowly defeated Webb Franklin, a former state court judge closely connected with the late James O. Eastland who controlled a powerful political machine.[81] Thus, the legislative and congressional reapportionment suits were indicative of the hurdles black voters had to overcome in order to gain access to political office.

Local jurisdictions often followed the state's lead in protracting litigation, presumably to delay the enforcement of the Act.[82] For example, an effort to obtain single-member election districts for the Warren County Board of Supervisors took nine years to achieve,[83] and Hinds County election districts were redistricted by the board of supervisors in a racially nondiscriminatory manner only after two district court trials and an *en banc* decision by the United States Court of Appeals for the Fifth Circuit.[84] Nevertheless, black litigants did achieve some success in gaining access to the ballot and political office during the early years after enactment of the 1965 Act.

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[73] *Voting in Mississippi*, *supra* note 53, at 20-22.

[74] JOINT CENTER FOR POLITICAL STUDIES, NATIONAL ROSTER OF BLACK ELECTED OFFICIALS FOR YEARS, 1975-1988.

[75] *Id.*

[76] *Id.*

[77] U.S. BUREAU OF THE CENSUS, 1980 CENSUS OF POPULATION AND HOUSING; MISSISSIPPI RESEARCH & DEVELOPMENT CENTER, PROFILE OF MISSISSIPPIANS BY RACE (1984).

[78] 279 F. Supp. 619 (S.D. Miss. 1966).

[79] *Id.* at 622. *See generally* Parker, *Vote Dilution*, *supra* note 13, at 402 (goal was black congressional representative).

[80] The second congressional district had the highest black population of all of Mississippi's congressional districts at the time of Espy's election, with a black population of 58% and a black voting age population of 52.8%. Jordan v. Winter, 604 F. Supp. 807, 814 (N.D. Miss.), *aff'd sub. nom.* Mississippi Republican Executive Committee v. Brooks, 469 U.S. 1002 (1984).

[81] James O. Eastland was a former United States Senator from Mississippi who chaired the powerful Senate Judiciary Committee during the time the Voting Rights Act was enacted by Congress. Eastland vigorously opposed the Act. SHERRILL, GOTHIC POLITICS IN THE DEEP SOUTH, 202-223 (1969).

[82] *See generally*, Parker, *County Redistricting*, *supra* note 13, at 418 (gerrymander-

B. Litigation: 1975-1982

Although early litigation under the Act focused on gaining access both to the ballot and political office, the primary focus of that litigation was to gain ballot access.[85] This focus was consistent with Congress' purpose in passing the Act,[86] and in extending the preclearance requirements for an additional five years in 1970.[87] In 1975, Congress again extended the requirements for an additional ten years.[88] This extension was adopted by Congress "to insure the applicability of Section 5 protections during the reapportionment and redistricting which will take

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ing was one effective method of diluting black votes).

[83] United States v. Warren County Bd. of Supervisors, 429 U.S. 642, 643 (1977); Donnell v. United States, 682 F.2d 240, 241 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1204 (1983); Stokes v. Warren County Election Comm'n, No. J79-0425(c) (S.D. Miss. 1979); Parker, *County Redistricting*, *supra* note 13, at 404-05.

[84] Kirksey v. Hinds County Bd. of Supervisors, 554 F.2d 139, 141 (5th Cir.), *cert. denied*, 434 U.S. 968 (1977).

[85] *See supra* notes 15-84.

[86] *See* H.R. Rep. No. 439, 89th Cong. 1st Sess 1, *reprinted in* 1965 U.S. Code Cong. & Admin. News 2437, 2437 (purpose of Voting Right Act of 1965 was to prevent discrimination against blacks and other language minorities).

[87] Section 5's preclearance provision, 42 U.S.C. § 1973 (c), was the primary statute utilized by voting rights litigants to gain ballot access during the formative years of voting rights litigation. Perkins v. Matthews, 301 F. Supp. 565 (S.D. Miss. 1969), *rev'd*, 400 U.S. 379, 387-88 (1971). Under § 5, the original preclearance requirements were enacted for a period of five years, from 1965 to 1970. H.R. Rep. No. 439, 89th Cong., 1st Sess. 1, *reprinted in* 1965 U.S. Code Cong. & Admin. News 2437, 2456. Congress, after conducting hearings on the matter, decided that the provisions should be extended for an additional five years. H.R. Rep. No. 379, 91st Cong., 2d Sess. 4, *reprinted in* 1970 U.S. Code Cong. & Admin. News 3277, 3281.

[88] S. Rep. No. 295, 94th Cong., 1st Sess. 1, *reprinted in* 1975 U.S. Code Cong. & Admin. News 774, 774.

place subsequent to the 1980 Decennial Census."[89]

During the period from 1975 to 1982, private enforcement litigation increased and was aimed at requiring preclearance of more stringent requirements for candidates for political office,[90] changes in the method of election for county boards of education and election commissioners[91], municipal redistricting plans,[92] municipal annexations,[93] new voter registration requirements,[94] state court decrees altering voting practices,[95] polling place changes,[96] changes in policies of school boards respecting political participation,[97] as well as attempts to gain access to political office.[98] This litigation "generally followed a model developed in critical Fifth Circuit cases"[99] such as *Kirksey v. Board of Supervisors of Hinds County*[100] and *Zimmer v. McKeithen*[101] until the Supreme Court decided *City of Mobile v. Bolden.*[102] Prior to *Bolden*, litigants had to prove that, under the totality of the circumstances, a challenged electoral structure diluted minority voting strength.[103] Litigants met this burden by proving such factors as: (1) a history of official discrimination; (2) the existence of racial bloc voting;[104] (3) an unusually large election district, majority vote requirements, anti-single shot provisions, or other practices used to enhance discrimination;[105] (4) a candidate slating process;[106] and (5) the unresponsiveness of legislators to the minority's particular need.[107] However, proof of all of these factors was not required to establish a denial of access to political office.[108]

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[89] *Id.* at 8, 1975 U.S. CODE CONG. & ADMIN. NEWS at 783.

[90] *See* Waide v. Waller, 402 F. Supp. 922, 923 (N.D. Miss. 1975) (challenge to more stringent requirement for district attorney office).

[91] Matthews v. Leflore County Bd. of Election Comm'rs, 450 F. Supp. 765, 766 (N.D. Miss. 1978). In *Matthews*, the board of supervisors sought to change the method of election from single member districts to at-large elections. *Id.*

[92] *See* Canton Branch, NAACP v. City of Canton, 472 F. Supp. 859, 861 (S.D. Miss. 1979) (change from single-member districts to at-large elections). The words "redistricting" and "reapportionment" are often used interchangeably. Redistricting usually refers to redrawing election district lines in political subdivisions of the state. Such actions, when brought under the fourteenth amendment and predicated on the one-person, one-vote principal only, are heard by a single district court judge. Cook v. Luckett, 575 F. Supp. 479, 482 (S.D. Miss. 1983). However, reapportionment usually refers to a redistribution of the population in state legislative or congressional districts, and, if brought under the one-person, one-vote principal only, the case must be heard by a three-judge district court. Davis v. Bandemer, 478 U.S. 109 (1986) (states must try to achieve population equality in congressional districting); Reynolds v. Sims, 377 U.S. 533, 543 (1964) (same).

[93] *See* Dotson v. City of Indianola, 514 F. Supp. 397, 399 (N.D. Miss. 1981) (challenge to city annexations made without obtaining preclearance).

[94] *See* Crowe v. Lucas, 472 F. Supp. 937, 945 (N.D. Miss. 1979) (new registration submitted after implementation but preclearance requirement satisfied).

[95] *See* Hathorn v. Lovorn, 457 U.S. 255, 259 (1982) (change in procedure pursuant to Miss. Code Ann. § 37-7-217 (Supp. 1981) requiring majority of votes cast for election to school district's board of trustees).

[96] *See* Evers v. Hinds County Bd. of Supervisors, No. 79-1428 (5th Cir. May 5, 1980) (unpublished decision; disposition noted at 617 F.2d 292) (suit challenging changes in locations of polling places).

[97] *See* Jordan v. Cagle, 474 F. Supp. 1198, 1215 (N.D. Miss. 1979) (school board unconstitutionally refused to rehire teacher after criticism of board's refusal to allow teachers to work at election polls), *aff'd* 620 F.2d 298 (5th Cir. 1980).

[98] *See* Kirksey v. City of Jackson, 461 F. Supp. 1282, 1285 (S.D. Miss. 1978) (seeking injunctive relief against at-large election for commissioner form of government), *rev'd*, 625 F.2d 21 (5th Cir. 1980); Jackson v. Riddell, 476 F. Supp. 849, 852-57 (N.D. Miss.

The *White-Zimmer* factors[109] provided the basis by which

1979) (outlining difficulty of access to political parties by blacks).

[99] Issacharoff, *Litigating for Equality of Political Opportunity*, Civil Rights Litigation and Attorney Fees Annual HandBook 179 (1987). [hereinafter Issacharoff].

[100] 402 F. Supp. 658 (S.D. Miss. 1975), *aff'd*, 528 F.2d 536 (5th Cir. 1976), *rev'd on reh'g*, 554 F.2d 139 (5th Cir.), *cert. denied*, 434 U.S. 968 (1977).

[101] 485 F.2d 1297 (5th Cir. 1973), *aff'd on other grounds sub. nom.*, East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976).

[102] 446 U.S. 55 (1980).

[103] S. Rep. No. 417, 97th Cong., 2d Sess. 2, *reprinted in* 1982 U.S. Code Cong. & Admin. News 177, 179, 196-98. *See also* Parker, *The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 Va. L. Rev. 715, 718 (1983) [hereinafter Parker, The "Results" Test] (challenged districting schemes struck down when minority voters had few opportunities); Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. Rev. 77, 98-99 (1986) ("totality of circumstances" test applied before *Bolden*).

[104] S. Rep. No. 417, 97th Cong., 2d Sess. at 28-29., 1982 U.S. Code Cong. & Admin News at 206-07 (racial bloc voting referred to as racially polarized elections).

[105] *Id.*

[106] *See* United States v. Marrengo County Comm'n, 731 F.2d 1546, 1569 n.40 (11th Cir.) (candidate slating process can be discriminatory if racial discrimination prohibits minorities from actively seeking white support and votes), *cert. denied*, 469 U.S. 976 (1984).

[107] Zimmer v. McKeithen, 485 F.2d 1297, 1305 (5th Cir. 1973), *aff'd on other grounds sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976).

[108] *Id.*

[109] The factors derived their name from the United States Supreme Court decision in White v. Regester, 412 U.S. 755 (1973) and the United States Court of Appeals for the Fifth Circuit decision in Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973), *aff'd on other grounds sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976).

voting rights litigation was judged until *Bolden* in 1980. In *Bolden*, the Supreme Court made a "marked departure from earlier Supreme Court and lower court vote dilution cases"[110] by holding that proof of discriminatory intent was required in vote dilution cases.[111] Private enforcement efforts seeking access to public office in Mississippi slowed because of the difficulty in proving a section 2 violation under the *Bolden* standard,[112] until section 2 of the Act was amended in 1982.

III. CURRENT LITIGATION TRENDS

A. *The 1982 Amendment and Extension of the Act*

In 1982, Congress amended section 2 and extended section 5's preclearance requirements for an additional twenty-five years[113] "to restore the legal standard that governed voting discrimination cases prior to the Supreme Court's decision in *Bolden*."[114] That standard, the results test, required application of totality of the circumstances analysis,[115] and provided that if as a result of a challenged practice[116] or structure,[117] plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice, section 2 is violated.[118] The 1982 amendment lightened the burden placed on voting rights litigants by *Bolden*[119] and the preclearance requirements were extended "to ensure the full enforcement of the rights guaranteed by the fourteenth and fifteenth amendments to the Constitution."[120] Armed with the amended and extended statute, voting rights litigants in Mississippi mounted prolific challenges to denials of ballot and office access throughout the state.[121]

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[110] S. REP. NO. 417, 97th Cong., 2d Sess. at 26., 1982 U.S. CODE CONG. & ADMIN. NEWS at 203.

[111] *Bolden*, 446 U.S. at 66. Vote dilution cases are situations where Mississippi blacks sought access to political office. *See generally* Parker, *County Redistricting*, *supra* note 13, at 392-93 (changes in former shape of election districts made to prevent blacks from gaining political positions); Parker, *Vote Dilution*, *supra* note 13, at 414 (blacks in South are politically handicapped by pervasive discrimination from equal opportunity to participate in political process); 42 U.S.C. § 1973 (1982). *See also* S. REP. NO. 417, 97th Cong., 2d Sess. 3-79, 1982 U.S. CODE CONG. & ADMIN. NEWS at 179-258 (detailing legislative history of 1982 amendment).

[112] *See* Jordan v. City of Greenwood, 534 F. Supp. 1351, 1359, 1359-60 (N.D. Miss. 1982) (detailing difficulty of meeting *Bolden* standard as compared to *White-Zimmer* standard), *rev'd*, 711 F.2d 667 (5th Cir. 1983).

[113] S. REP. NO. 417, 97th Cong., 2d Sess. at 68., 1982 U.S. CODE CONG. & ADMIN. NEWS at 247.

[114] *Id.* at 15. U.S. CODE CONG. & ADMIN. NEWS at 192.

[115] *See generally* Parker, *The "Results" Test*, *supra* note 103, at 717-18 (Congress intended for courts to apply results standard rather than *Bolden* discriminatory intent test).

[116] Section 2 covers episodic, one-time, or series of events practices as well permanent structural barriers. *See* Welch v. McKenzie, 592 F. Supp. 1549, 1558 (S. D. Miss. 1984) (§ 2 covers episodic, one-time, or series of events practices as well as permanent structural barriers), *aff'd*, 765 F.2d 1311, 1315-16 (5th Cir. 1985); Goodloe v. Madison County Bd. of Supervisors, 610 F. Supp. 240, 243 (S.D. Miss. 1985) (recognizing that § 2

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covers episodic practices but delineating what constitutes an episodic practice).

[117] S. Rep. No. 417, 97th Cong., 1st Sess. at 28-31., 1982 U.S. Code Cong. & Admin. News at 205-08. Permanent structural barriers are those barriers to equal political participation by protected minorities which are enacted as laws or are longstanding practices within jurisdictions. *Id.*

[118] *Id.* at 28, 1982 U.S. Code Cong. & Admin. News at 206.

[119] *See generally*, Issacharoff, *supra* note 99 and accompanying text.

[120] S. Rep. No. 417, 97th Cong., 1st Sess. at 9-10, 1982 U.S. Code Cong. & Admin. News at 186-87.

[121] *See* Pendleton v. Heard, 642 F. Supp. 940 (S.D. Miss. 1986) (action seeking access to ballot for road and bridge bonds), *rev'd*, 824 F.2d 448, 451 (5th Cir. 1987); Monroe v. City of Woodville, 636 F. Supp. 423 (S.D. Miss. 1986) (action seeking realignment of district for board of aldermen elections), *rev'd*, 819 F.2d 507, 508 (5th Cir. 1987), *cert. denied*, 108 S.Ct. 774 (1988); Mississippi State Chapter, Operation Push v. Allain, 674 F. Supp. 1245, 1247 (N.D. Miss. 1987) (action challenging dual registration system and prohibition of off-site registration); Beamon v. City of Ridgeland, 666 F. Supp. 937, 940 (S.D. Miss. 1987) (action seeking access to school trustee elections); Houston v. Haley, 663 F. Supp. 346, 346-47 (N.D. Miss. 1987) (action challenging board of aldermen election system); Martin v. Allain, 658 F. Supp. 1183, 1185 (S.D. Miss. 1987) (consolidated action challenging election methods for judges in state); Crystal Springs Branch, NAACP v. Edwards, No. J85-0407 (L) (action seeking access to re-registration ballot); Kirksey v. Allain, 635 F. Supp. 347, 348 (S.D. Miss. 1986) (action alleging discriminatory practices in state judicial elections); Catchings v. City of Crystal Springs, 626 F. Supp. 987, 988 (S.D. Miss. 1986) (action seeking revised system of board of alderman elections); Goodloe v. Madison County Bd. of Elections, 610 F. Supp. 240, 241 (S.D. Miss. 1985) (action challenging constable elections), Jordan v. Winter, 604 F. Supp. 807, 808 (N.D. Miss. 1984) (parties contesting validity of congressional redistricting plan), *aff'd*, 469 U.S. 1002 (1985); Jordan v. City of Greenwood, 599 F. Supp. 397, 398 (N. D. Miss. 1984) (challenge to city's at-large commission form of government); Welch v. McKenzie, 592 F. Supp. 1549, 1551 (S.D. Miss. 1984) (supervisor elections challenged), *aff'd*, 765 F.2d 1311 (5th Cir. 1985); Cook v. Luckett, 575 F. Supp. 479, 481 (S.D. Miss. 1983) (action seeking injunction against county elections); Lucas v. Bolivar County, 567 F. Supp. 433, 433-34 (N.D. Miss. 1983) (action seeking injunction against proposed supervisor redistricting plan); United States v. Louisville Mun. Separate School Dist. Bd. of Trustees, 557 F. Supp. 1168, 1169 (N.D. Miss. 1983) (proposed change to school board elections challenged).

B. Access to the Ballot

Litigants seeking access to the ballot after the 1982 amendment concentrated both on requiring preclearance of voting changes before implementation by the state or its political subdivisions[122] and on tearing down remaining barriers to registration[123] and re-registration.[124]

The litigation strategy for obtaining preclearance of enacted voting changes was modified after the 1982 extension of section 5's requirements. Prior to this extension, Mississippi voting rights litigants brought separate enforcement actions for voting changes enacted within each political subdivision or for any particular enactment by the state affecting access to political office.[125] However, after the extension, litigants brought comprehensive section 5 actions seeking preclearance of a number of statutes without regard to whether litigants would subsequently seek access to the affected offices.[126]

For example, litigants in three cases sought comprehensive preclearance of enacted voting changes: *Kirksey v. Allain,*[127] *Kirksey v. Pittman,*[128] and *NAACP v. Allain.*[129] In *Kirksey v.*

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[122] *See supra* notes 58 and 121 (list of cases challenging voting changes which had not been precleared); *see also* NAACP v. Allain, No. J87-0518 (B) (S.D. Miss. filed Sept. 11, 1987) (action seeking access to ballot and office for thirty-one county school districts); Carter v. Hinds County Bd. of Educ., No. J87-0262 (L) (S.D. Miss. filed May 11, 1987) (action seeking access to ballot and office for county board of education); Mingo v. James, No. J85-0848 (L) (S.D. Miss. filed Sept. 10, 1985) (action seeking access to ballot and office for board of selectmen election).

[123] *See* Mississippi State Chapter, Operation Push v. Allain, 674 F. Supp. 1245, 1247 (N.D. Miss. 1987) (challenge to dual registration registration and prohibition of off-site registration).

[124] *See* Crystal Springs Branch, NAACP v. Edwards, No. J85-0407 (L) (S.D. Miss. filed May 11, 1987) (action challenging implementation of Copiah County's voter re-registration requirement prior to obtaining pre-clearance and discriminatory time period for re-registration).

[125] *See* Comment, *Mississippi, supra* note 6, at 834 n.222 (listing all objections made to voting changes proposed by political subdivisions in the state from 1965 to 1982).

[126] *See* Kirksey v. Allain, 635 F. Supp. 347, 348 (S.D. Miss. 1986) (plaintiffs brought suit without first seeking judicial offices in question); *see also* Martin v. Allain, 658 F. Supp. 1183, 1193 (S.D. Miss. 1987) (details difficulty blacks had in seeking judicial office).

[127] 635 F. Supp. 347 (S.D. Miss. 1986).

[128] C.A. No. J86-0558 (B) (S.D. Miss. filed Aug. 12, 1986).

[129] C.A. No. J87-0518 (B) (S.D. Miss. filed Sept. 11, 1987).

Allain, twenty-five black voters in Mississippi, whose counties of residence encompassed each circuit court, chancery court, and multi-judge county court district within the state, filed an action seeking preclearance of every statute pertaining to judicial elections enacted by the State of Mississippi since the effective coverage date of section 5[130] and challenging the at-large method of election for multi-judge circuit, chancery, and county court districts in the western half of the state.[131] The State contended that elections to judicial offices were not within the coverage of section 5,[132] and that some of the challenged statutes were merely recodifications of pre-coverage law.[133] A three-judge district court held that preclearance was not required for pre-coverage recodification,[134] and that judicial elections are covered by section 5 and preclearance of post-coverage voting changes must be obtained.[135] Thus, private plaintiffs were successful in the first comprehensive post-1982 extension litigation.

Kirksey v. Allain was followed shortly afterward by a second, more comprehensive, section 5 private enforcement effort styled *Kirksey v. Pittman*,[136] a challenge to all post-coverage state-enacted voting changes implemented without preclearance.[137] The defendants[138] filed motions to dismiss the section 5 claims respecting bond or tax issues on the ground that the Federal Anti-Tax Injunction Act[139] precluded federal district courts from exercising jurisdiction over state tax matters since bonds were taxes within the meaning of the Anti-Tax Injunction Act.[140]This argument had been advanced by the Copiah County Board of Supervisors, State Bond Attorney, and State Attorney General in *Pendleton v. Heard*,[141] but had been rejected by the United States Court of Appeals for the Fifth Circuit.[142] As to the remaining voting challenges in *Kirksey v. Pittman*, the defendants submitted the changes to the United States Attorney General for section 5 review.[143] To date, this has been the most comprehensive section 5 action brought against the state to seek preclearance of proposed voting changes.

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[130] *Kirksey v. Allain*, 635 F. Supp. at 348.

[131] *Id.* at 348.

[132] *Id.* at 349-50.

[133] *Id.* at 350.

[134] *Id.*

[135] *Id.* at 349. The state submitted post-coverage voting changes for judicial elections to the United States Attorney General for § 5 review. The Attorney General objected to the numbered post features of the at-large elections for twenty-four judgeships. Letter from William Bradford Reynolds, Asst. Att'y Gen., Civil Rights Division, U.S. Department of Justice, to Stephen J. Kirchmayr, Deputy Mississippi State Att'y Gen. (July 1, 1986). The state requested reconsideration, but the Attorney General did not withdraw the objection. Letter from Reynolds to Kirchmayr (Sept. 8, 1987). Thereafter, the State filed a declaratory judgment action in the United States District Court for the District of Columbia seeking preclearance. Mississippi v. United States, No. 87-3464 (D. D. C. 1987). The court ruled that judicial elections are covered by § 5 and the state's statutes were not retrogressive. *Id.* The court did not decide whether the statutes had a discriminatory intent since the matter was before the court on a motion for summary judgment and that the state had failed to meet its burden in proving on summary judgment the absence of racial purpose in the enactment and maintenance of the statutes. *Id.* The state dismissed this case on December 29, 1988.

[136] No. J86-0558(B) (S.D. Miss. filed Aug. 12, 1986).

The third major comprehensive section 5 enforcement action was *NAACP v. Allain.*[144] This action followed the successful, but limited, enforcement actions of *Carpenter v. Oktibbeha County Board of Education*[145] and *Carter v. Hinds County Board of Education.*[146] These actions were limited in that the plaintiffs sought preclearance of voting changes with respect to county school board elections for two counties only, Oktibbeha and Hinds.[147] Following the success of these actions, the state

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[137] *Id.* The statutes challenged as not precleared included those respecting voting on bond issues for municipal separate school districts, boards of supervisors, roads and bridges, industrial development, youth courts, economic development districts, sewer districts, county schools, and taxes for development district. *Id.*

[138] *Id.* Named as defendants were Edwin Lloyd Pittman, State Attorney General; William A. Allain, Governor; Dick Molpus, Secretary of State; the State Board of Election Commissioners; Jackson and Hazlehurst Municipal Separate School Districts; Hinds County Board of Supervisors; Hinds County Election Commission; the State Democratic and Republican Executive Committees; the City of Jackson; the City of Jackson's Democratic Circuit Clerk; and the Pearl River Basin Development District, as a defendant class representative of the state and its political subdivisions. *Id.*

[139] 28 U.S.C. § 1341 (1982).

[140] Kirksey v. Pittman, No. J86-0558(B) (S.D. Miss. filed Aug. 12, 1986).

[141] 642 F. Supp. 940, 942 (S.D. Miss. 1986), *rev'd*, 824 F. 2d 448 (5th Cir. 1987).

[142] *Pendleton*, 824 F.2d at 451-52.

[143] *See supra* note 58 and accompanying text.

[144] No. J87-0518 (B) (S.D. Miss. filed Sept. 11, 1987).

[145] No. EC 86-320 DD (N.D. Miss. 1987).

[146] No. J87-0262(L) (S.D. Miss. filed May 11, 1987).

[147] NAACP *v. Allain*, No. J87-0518(B).

NAACP and presidents of various local chapters within the state filed a comprehensive enforcement action against thirty-one county school districts within the state.[148] Shortly thereafter, the United States Attorney General filed a separate enforcement action[149] seeking preclearance of many of the same voting changes challenged in *NAACP v. Allain*.[150] These enforcement efforts have been successful because the state and the affected school districts[151] entered into a joint motion to enter a consent decree requiring preclearance of any post-November 1, 1964 voting changes.[152]

IV. Barriers to Registration

Although the 1965 Voting Rights Act was aimed primarily at eliminating discriminatory barriers to registration,[153] such barriers are still present in Mississippi.[154] Until recently, "dual registration"[155] and the prohibition of "off-site" or "satellite" registration[156] remained in effect.[157] On March 1, 1984, eight Mississippi black voters and two civil rights organizations filed a private enforcement action under section 2 of the Act, seeking declaratory and injunctive relief against such registration statutes.[158] While the action was pending, the state legislature amended the affected voting statutes and the state attorney general obtained preclearance of the amendments.[159] However, the lawsuit was not mooted since dual registration remained in use in some counties and satellite registration was still prohibited.[160] During the trial, the plaintiffs presented evidence that Mississippi had an extensive history of official intentional racial discrimination affecting voting, extreme racial bloc voting,[161] gross socio-economic disparities between whites and blacks, racial election campaigning and a disproportionate percentage of black elected officials.[162] Plaintiffs' proof conclusively showed that gross socio-economic differences "have a disparate impact on the opportunities of black citizens in Mississippi to register to vote."[163] As a result of this disparate impact, "the black registration rate was approximately 25 percentage points below the white registration rate."[164] Thus, the district court held that the dual registration and non-uniform satellite registration statutes, under the totality of the circumstances, violated section 2.[165] Since the legislature was to convene shortly after the decision was rendered, the court did not enter an injunction but gave the state an opportunity to remedy the violation.[166] The court did, however, retain jurisdiction in the event that further remedial relief was required.[167] As a result, the Mississippi legislature enacted Senate Bill 2610 on April 15, 1988[168] to remedy the voter registration statutes found discriminatory in *Mississippi State Chapter, Operation Push v. Allain.*[169] The state attorney general submitted the amended statute to the United States Attorney General for preclearance on May 31, 1988.[170] Although the court had indicated that the statute remedied the voting rights violations, the plaintiffs continued to disagree.[171]

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[148] *Id.*

[149] *See* United States v. Mississippi, No. J87-0723(L) (S.D. Miss. filed Dec. 30, 1987) (§ 5 enforcement action only).

[150] *Id.*

[151] The affected school districts are Alcorn County, Chickasaw County, Clay County, Coahoma County, Copiah County, Hinds County, Holmes County, Jones County, Lafayette County, Lamar County, Lauderdale County, Lee County, Leflore County, Lowndes County, Marion County, Marshall County, Monroe County, Pontotoc County, Prentiss County, Rankin County, Scott County, Tate County, Tishomingo County, Union County, Washington County, and Yazoo County. *Id.*

[152] Proposed Consent Decree in United States v. Mississippi, No. J87-0723 (W) (S.D. Miss. filed June 10, 1988).

[153] Note, *Civil Rights — Voting Rights Act of 1965 Suspends State Literacy Tests and Authorizes Federal Voting Registrars in Literacy Test States Where Less Than Fifty Percent of the Population Registers or Votes*, 44 Tex. L. Rev. 1411, 1411 (1966).

[154] *See* Mississippi State Chapter, Operation Push v. Allain, 674 F. Supp. 1245, 1247 (N.D. Miss. 1978) (recent case challenging dual registration).

[155] *Mississippi State Chapter, Operation Push*, 674 F. Supp. at 1248-49. "Dual registration" refers to the practice which requires municipal voters to register to vote at the county registrar's office before being allowed to register as a municipal voter. *Id.*

[156] *Id.* at 1250. "Off-site" or "satellite" registration refers to the practice of conducting registration outside the office of the registrar. *Id.*

[157] *Id.*

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[158] *Id.* at 1247-49.

[159] *Id.* at 1249.

[160] *Id.* at 1249-52.

[161] Evidence of racial bloc voting is pivotal in vote dilution cases. *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30, 55 (1986) (racial bloc voting evidence is pivotal in vote dilution cases); Citizens for a Better Gretna v. City of Gretna, 834 F.2d 496, 499 (5th Cir. 1987) ("Racial bloc voting is the linchpin of a § 2 vote dilution claim."); Engstrom & McDonald, *Definitions, Measurements, and Statistics: Weeding Wildgen's Thicket*, 20 URB. LAW. 175, 175 (1988) (central evidentiary consideration in almost all vote dilution cases is extent of racial polarization); Jacobs & O'Rourke, *Racial Polarization in Vote Dilution Cases Under Section 2 of the Voting Rights Act: The Impact of Thornburg v. Gingles*, 3 J. L. & POL. 295, 297 (1986) (vote dilution claim requires court's overall judgment of whether voting strength of minority voters is minimized or cancelled out); Engstrom & McDonald, *Quantitative Evidence in Vote Dilution Litigation: Political Participation and Polarized Voting*, 17 URB. LAW. 369, 369-70 (1985) (plaintiffs cannot prevail unless they prove that challenged electoral system or rule was used for purpose of diluting impact); J. LOWEN, SOCIAL SCIENCE IN THE COURTROOM 190 (1982).

[162] *Mississippi State Chapter, Operation Push*, 674 F. Supp. at 1252.

[163] *Id.* at 1255.

[164] *Id.* Plaintiffs' expert, Dr. Allan Lichtman, testified that blacks are registered at the rate of 54% of the black voting age population while whites are registered at the rate of 79%. *Id.*

[165] *Id.* at 1268.

V. Challenges to Re-Registration

In addition to challenging discriminatory barriers to registration, litigants have also challenged discriminatory barriers to re-registration.[172] In *Crystal Springs Branch of the NAACP v. Edwards*,[173] black voters challenged racially discriminatory and unprecleared re-registration procedures in Copiah County.[174] In *Edwards*, the Copiah County Board of Supervisors adopted and implemented a re-registration plan without obtaining preclearance.[175] The re-registration process was initiated eighteen and one-half months after black voters had succeeded in obtaining two 65%-plus black majority supervisor districts,[176] and sixteen months after Manual Welch, a black candidate, had lost an election in Copiah County while seeking to become

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[166] *Id.* at 1268-70.

[167] *Id.* at 1269-70.

[168] Act of April 15, 1988, ch. 350, 1988 Miss. Laws 108, 113.

[169] *Mississippi State Chap., Operation Push*, 674 F. Supp. at 1268-70.

[170] *See* Notice of Section 5 submission, issued by U.S. Department of Justice, Civil Rights Division (June 24, 1988) (Mississippi statute submitted for preclearance).

[171] *Mississippi State Chap., Operation Push*, 674 F. Supp. at 1268-70.

[172] *See* S. Rep. No. 417, 97th Cong., 2d Sess. 14, 1982 U.S. Code Cong. & Admin. News at 191 n.42. (recognition by Congress that discriminatory re-registration practices were serious impediment to voting).

[173] No. J85-0407 (L) (S.D. Miss. filed May 1, 1985).

[174] *Edwards*, No. J85-0407 (L).

[175] *Id.*

[176] *See* Pendleton v. Hood, No. J83-03519 (B) (Order entered Oct. 20, 1983).

Copiah County's first black supervisor.[177] After Welch unsuccessfully challenged the election in federal court and the victor was indicted by a state court grand jury, a re-registration was ordered.[178] The Crystal Springs Branch of the NAACP and seven county voters[179] filed a class action one day before the scheduled re-registration was to begin, seeking a temporary restraining order.[180]

The temporary restraining order was denied and the action was certified as a class action with a class including all black citizens and black registered voters in the county.[181] On that date, the parties settled the case, agreeing to expand re-registration hours, places, and accommodations.[182] An agreed order was entered ratifying the settlement agreement and dismissing the case.[183] The county then submitted the revised re-registration plan to the United States Attorney General for preclearance.[184] As a result, the black voters had achieved the goal of their enforcement action.

VI. EPISODIC PRACTICES

Once black litigants were successful at overcoming barriers to registration and voting[185] and permanent structural barriers to holding office,[186] they sometimes faced one-time or episodic barriers[187] that denied them equal access to the political process.[188] When Congress amended section 2 in 1982, it was clear that discriminatory episodic election practices were to be prohibited.[189] Blacks in two Mississippi counties, Madison and Copiah, instituted private enforcement actions aimed at striking down racially discriminatory episodic voting practices.[190] The suits, however, reached differing results because of the varying interpretations of section 2 in episodic practices cases. In *Goodloe v. Madison County Board of Election Commissioners*,[191] two unsuccessful black candidates for the office of constable and voters who had cast absentee ballots invalidated by the board of election commissioners instituted a section 2 action challenging the rejection of the absentee ballots cast primarily by black voters.[192] The board of election commissioners based the rejection on four bad absentee ballots which were cast in the election.[193] Specifically, the black voters alleged that the wholesale invalidation of absentee votes was an episodic practice resulting in a denial of access to the political process.[194] After denying a preliminary injunction,[195] the district court held that the series of events leading up to and including the invalidation of the absentee ballots was an episodic practice within the meaning of section 2 and operated "to deny the black voters who cast these absentee ballots an equal opportunity to participate and elect candidates of their choice."[196] The district court, however, had applied the analysis applicable to vote denial cases rather than vote dilution.[197]

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[177] *See* Welch v. McKenzie, 592 F. Supp. 1549, 1550-51 (S.D. Miss. 1984) (action challenging supervisory election in Copiah County), *aff'd*, 765 F.2d 1311 (5th Cir. 1985).

[178] *Edwards*, No. J85-0407(L).

[179] *Id.* The individual voters were Jessie Pendleton, Earnest Thomas, Manuel Welch, Dorothy Catchings, Rev. Ellis Blackwell, Jr., Ronald T. Stanton, and Lee Ester Crump. *Id.*

[180] *Id.* In direct § 5 actions, a temporary restraining order may be granted by the district judge until a three judge panel is convened. 28 U.S.C. § 2284 (b)(3)(1982).

[181] *Edwards*, C.A. No. J85-0407(L).

[182] *Id. See generally* Rice, *Copiah Extends Re-Registration Through '88; NAACP Drops Suit*, Clarion Ledger, June 29, 1985, at 3B, col. 1 (agreed to Saturday registrations, re-registration, and automatic re-registration for voters who voted in elections between January 1, 1986 and December 31, 1988).

[183] *Edwards*, C.A. No. J85-0407(L).

[184] *Id.*

[185] *See generally* Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 544-52 (1973) (discussion of restraints affecting blacks' right to vote); Engstrom, *Racial Vote Dilution: Supreme Court Interpretations of Section 5 of the Voting Rights Act*, 4 S.U.L. REV. 139, 139-40 (1978) [hereinafter Engstrom, *Racial Vote Dilution*] (increase in number of black voters).

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[186] *See supra* note 117 and accompanying text (definition of permanent structural barriers).

[187] *See supra* note 116 and accompanying text (definition of episodic voting barriers).

[188] S. Rep. No. 417, 97th Cong., 2d Sess. 30, *reprinted in* 1982 U.S. Code Cong. & Admin. News 177, 207-08.

[189] *Id.* The legislative history on episodic practices provided:

> If the challenged practice relates to such a series of events or episodes, the proof sufficient to establish a violation would not necessarily involve the same factors as the courts have utilized when dealing with permanent structural barriers. Of course, the ultimate test would be the White standard codified by this amendment of Section 2: whether, in the particular situation, the practice operated to deny the minority plaintiff an equal opportunity to participate and to elect candidates of their choice.

S. Rep. No. 417, 97th Cong., 2d Sess. at 30, 1982 U.S. Code Cong. & Admin. News. at 207.

[190] *See* Goodloe v. Madison County Bd. of Election Comm'rs, 590 F. Supp. 1182, 1182 (S.D. Miss. 1984) (Madison County case), *later case* 610 F. Supp. 240 (S.D. Miss. 1985); Welch v. McKenzie, 592 F. Supp. 1549, 1550-51 (S.D. Miss. 1984), *aff'd*, 765 F.2d 1311 (5th Cir. 1985) (Copiah County Case).

[191] 590 F. Supp. 1182 (S.D. Miss. 1984); *later case*, 610 F. Supp. 240 (S.D. Miss. 1985).

[192] *Goodloe*, 610 F. Supp. at 241.

[193] *Id.*

[194] *Id.* at 242-43.

Welch v. McKenzie[198] was markedly different in the claims advanced by the black voters and in the analysis the court applied to those claims.[199] In *Welch*, an unsuccessful black candidate for the office of supervisor and three other black voters filed a section 2 action claiming that county election officials had engaged in episodic election practices resulting in a *dilution* of black voting strength.[200] The voters claimed that county election officials, in concert with the incumbent white supervisor, had illegally stuffed the ballot boxes with 115 illegal absentee ballots, thus diluting the black voting strength in the affected supervisor's district.[201] The voters had not claimed that black voters were prohibited from casting an absentee ballot or from having their absentee ballots counted, but rather that the voting strength evidenced by the overwhelming votes received by the candidate in precincts with a black majority had been diluted by the election officials in stuffing ballot boxes and in counting those illegal votes.[202]

Rather than applying vote dilution analysis, both the trial and appellate courts applied vote denial analysis to reach the decision that section 2 had not been violated.[203] The district court held that the error of election officials in counting the illegal absentee ballots "was neutral in its effect on race and equally applied to all absentee voters."[204] The United States Court of Appeals for the Fifth Circuit affirmed, stating that if the registrar in this case had supplied absentee ballots only for white voters, the district court's decision "might have been sorely taxed."[205]

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[195] *Id.* at 241.

[196] *Id.* at 243.

[197] *Id. See generally* Engstrom, *Racial Vote Dilution*, *supra* note 185, at 140-41 (distinction between vote denial and vote dilution).

[198] 592 F. Supp. 1549 (S.D. Miss. 1984), *aff'd*, 765 F.2d 1311 (5th Cir. 1985).

[199] *Welch*, 765 F.2d at 1312-17.

[200] *Id.* at 1312.

[201] *Id.* at 1312-14.

[202] *Id.*

[203] *Id.* at 1316-17.

In episodic practices vote dilution claims, the proper analysis to be applied should be vote dilution rather than vote denial.[206] Although the same factors may not be used in determining vote dilution when permanent structural barriers are challenged, the ultimate test in an episodic practices challenge should be the *White* standard of whether, in the particular situation, the practice operated to deny the minority plaintiff an equal opportunity to participate *and to elect candidates of their choice.*[207] The determination of equal access to political processes must depend upon a searching and practical evaluation of both past and present reality.[208] Since Congress failed to catalog the factors relevant to vote dilution claims challenging episodic practices, the determination of the relevant factors are left to the courts.[209] The pivotal *White-Zimmer* factors, *i.e.*, the presence of racial bloc voting, the extent to which minority group members have been elected to public office in the jurisdiction, the history of racial discrimination, and the existence of certain socio-economic factors provide a good starting point.[210]

VII. Elections to Judicial Office

After achieving success in overcoming registration barriers and increasing black voter registration, voting rights litigants began to seek access to political office. Initially, all efforts to obtain access to political office were geared toward legislative seats.[211] After all, it was state legislative action that had been used to erect new barriers against blacks in their attempt to gain access to the ballot and political office.[212] At the time of the passage of the Voting Rights Act of 1965, there were only three black attorneys in the state.[213] In fact, the first black law student did not graduate from the University of Mississippi School of Law until 1967.[214] Today, only about 2.5% of all lawyers eligible to run for circuit, chancery, county, or supreme court judgeships are black.[215] Since racial discrimination had effectively prohibited blacks from meeting eligibility requirements for judicial offices other than justices of the peace, blacks could not successfully gain access to those offices until the number of black attorneys in the state substantially increased.[216] Therefore, private enforcement efforts to gain access to public office did not initially include efforts to win circuit, chancery, county, or supreme court judgeships.[217] The number of black attorneys in the state increased from three in 1965 to approximately 220 in 1987.[218] Of that number, approximately 150 were statutorily qualified to run for circuit, chancery, and county judgeships.[219]

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[204] *Welch*, 592 F. Supp. at 1558.

[205] *Welch*, 765 F.2d at 1316.

[206] *See* Derfner, *Vote Dilution and the Voting Rights Act Amendments of 1982*, Minority Vote Dilution 145 (C. Davidson ed. 1984) (discussion of minority vote dilution under § 2 of Voting Rights Act).

[207] White v. Regester, 412 U.S. 755, 767-69 (1973); *see also* S. Rep. No. 417, 97th Cong., 2d Sess. at 30, 1982 U.S. Code Cong. & Admin. News at 207 (effect of 1982 amendment of Voting Rights Act was to ratify *White* standard).

[208] S. Rep. No. 417, 97th Cong. 2d Sess. at 30, 1982 U.S. Code Cong. & Admin. News at 207.

[209] *Id.* at 29, 1982 U.S. Code Cong. & Admin. News. at 207.

[210] *Id.* at 28-29, 1982 U.S. Code Cong. & Admin. News at 206-07.

In 1984, Floydist Martin and black voters in the Seventh Circuit Court District,[220] Fifth Chancery Court District[221] and Hinds County Court District[222] brought a private enforcement action, predicated upon sections 2 and 5 of the Act as well as the fourteenth and fifteenth amendments to the United States Constitution, seeking access to judicial offices in those districts by challenging the at-large, multi-member election method.[223]

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[211] *See supra* note 67 and accompanying text.

[212] *See supra* note 39 and accompanying text (in 1982 amendment to Act Congress recognized that new barriers were erected to prevent minority vote).

[213] Martin v. Allain, 658 F. Supp. 1183, 1192-93 (S.D. Miss. 1987). *See generally* Rose, *Historical Notes on Black Lawyers in Mississippi*, 33 MISS. LAW. 14, 15 (1987) (only small number of black attorneys in practice in Mississippi in 1965).

[214] *Martin*, 658 F. Supp. at 1192.

[215] *Id.* at 1193.

[216] *Id.* at 1192-93.

[217] *Id.* at 1193.

[218] *Id.*

[219] *Id. See* MISS. CODE ANN. § 9-9-5 (Supp. 1988) (qualifications for county court and circuit court judges are same).

[220] *See* MISS. CODE ANN. § 9-7-23 (Supp. 1988) (Seventh Circuit Court district composed of Hinds and Yazoo Counties).

[221] *See* MISS. CODE ANN. § 9-5-17 (Supp. 1988) (Fifth Chancery Court District composed of Hinds County).

[222] *See* MISS. CODE ANN. § 9-9-15 (1972) (Hinds County Court District composed solely of Hinds County).

On October 17, 1985, State Senator Henry Kirksey and twenty-four black voters residing in every circuit, chancery, and multi-judge county court district within Mississippi filed a comprehensive enforcement action challenging the state's failure to preclear statutes pertaining to voting for judicial offices, the use of multi-member judicial elections within certain court districts,[224] the positioning of boundary lines in various judicial districts in the western half of the state, and the dilution of black voting strength on both the one-person, one-vote principle and racial dilution grounds.[225] The plaintiffs maintained that at-large, multi-member elections had a racially discriminatory purpose and result.[226] After the district court prohibited the state from implementing the statutes without preclearance,[227] *Kirksey v. Allain* and *Martin v. Allain* were consolidated.[228] The state argued that judicial elections were not within the coverage of sections 2 or 5, that the one-person, one-vote principle did not apply to judicial elections, that the district lines were not discriminatory, that multi-member, at-large elections were not discriminatory, that there was no racially discriminatory purpose in the enactment or maintenance of the judicial districts or election mechanisms, and that black voters had an equal opportunity to elect judicial candidates of their choice.[229] The court held that post-coverage voting changes affecting judicial elections were within the Act's coverage since section 2 applied to the election of state court judges.[230] This holding, the first to apply section 2 of the Act to judicial elections, has been approved by the United States Courts of Appeals for the Fifth[231] and Sixth Circuits.[232] The state had argued in *Martin* that vote dilution analysis utilized in voting rights cases was grounded in the fourteenth amendment's one-person, one-vote principle and was not applicable to judicial elections.[233] However, the state had overlooked the congressional purpose behind the passage of the Voting Rights Act.[234] Congress hoped the Act would deal "with continuing voting discrimination, not step by step, but comprehensively and finally."[235] Thus, the Act was designed to eradicate dilutionary schemes aimed at offsetting the gains made by protected minorities at the ballot box.[236] Racial vote dilution analysis under the fifteenth amendment, like the similar analysis under the fourteenth amendment, is focused on whether protected minority voters are denied the opportunity to effectively participate in the political process.[237] The fifteenth amendment protects the rights of blacks to participate at all levels of the political process,[238] including the process respecting judicial elections.[239]

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[223] Martin v. Allain, 658 F. Supp. 1183, 1185 (S.D. Miss. 1987).

[224] Kirksey v. Allain, 635 F. Supp. 347, 348 (S.D. Miss. 1986). The challenged Chancery Court Districts were the Fifth, Seventh, Ninth, and Eleventh, and the challenged Circuit Court Districts were the Fourth, Seventh, Ninth, Eleventh, and Twentieth. *Id.* *See* MISS. CODE ANN. §§ 9-5-17 (Supp. 1988) (composition of Fifth Chancery Court District); 9-5-23 (Supp. 1988) (Seventh Chancery Court District); 9-5-37 (Supp. 1988) (Eleventh Chancery Court District); 9-7-15 (Supp. 1988) (Fourth Circuit Court District); 9-7-31 (Supp. 1988) (Ninth Chancery Court District); 9-7-29 (Supp. 1988) (Ninth Circuit Court District); 9-7-33 (Supp. 1988) (Eleventh Circuit Court District); 9-7-53 (Supp. 1988) (Twentieth Circuit Court District).

[225] *Kirksey*, 635 F. Supp. at 348.

[226] *Id.*

[227] *Id.* at 347.

[228] *Martin*, 658 F. Supp. at 1200.

[229] *Martin*, 658 F. Supp. at 1194-1204.

Congress, in amending section 2 of the Act in 1982, sought to "ensure full protection of the Fourteenth and Fifteenth Amendment rights."[240] Those rights belong to the voters[241] and not the candidates or specific offices,[242] regardless of whether the office was judicial, executive, or legislative.[243] If a state has made a particular office elective, then that state cannot erect or maintain election mechanisms which would operate to deny minority voters an equal opportunity to participate and elect candidates of their choice.[244] Therefore, the focus of the inquiry as to whether the particular voting mechanism is within the coverage of section 2 should not be that the office is being sought, but how the protected minority's ballot was affected by the challenged structure.[245]

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[230] *Id.* at 1198-1204.

[231] Chisom v. Roemer, 853 F.2d 1186, 1192 (5th Cir.), *reh'g denied*, 857 F.2d 1473 (5th Cir. 1988).

[232] Mallory v. Eyrich, 839 F.2d 275, 281 (6th Cir. 1988).

[233] *Martin*, 658 F. Supp. at 1200.

[234] *See supra* note 5 and accompanying text.

[235] S. REP. No. 417, 97th Cong., 2d Sess. at 30, 1982 U.S. CODE CONG. & ADMIN. NEWS at 182.

[236] *Id.* at 6, 1982 U.S. CODE CONG. & ADMIN. NEWS at 183.

[237] Perkins v. City of West Helena, 675 F.2d 201, 209 (8th Cir.), *aff'd sub nom.* City of West Helena v. Perkins, 459 U.S. 801 (1982).

[238] Nevett v. Sides, 571 F.2d 209, 220 (5th Cir.), *reh'g denied*, 575 F.2d 300 (5th Cir. 1978), *cert. denied*, 446 U.S. 951 (1980).

[239] Voter Information Project v. City of Baton Rouge, 612 F.2d 208, 212 (5th Cir. 1980).

[240] S. REP. No. 417, 97th Cong., 2d Sess. at 27, 1982 U.S. CONG. CONG. & ADMIN. NEWS at 204.

[241] *See* Allen v. Board of Elections, 393 U.S. 544, 565-70 (1969) (rights belong to

In *Martin*, the defendants also argued that the Act contained language limiting section 2's application to legislative offices. However, the state failed to recognize that the Act does not contain language exempting judicial elections from its coverage.[246] In amending section 2, Congress noted that opponents of the amendment had sought to create similar distinctions in the language of the Act but stated:

> It is true that section 2 originally had no reference to a results or effects standard, while section 5 does. But as Senator Specter noted at the hearings, that argument proves nothing, inasmuch as section 2 is also silent as to any intent standard, and section 5 refers to proof of both discriminatory purpose and discriminatory effect.[247]

Therefore, it is plain that Congress intended that section 2, as well as section 5, have broad application where the voting process was involved.[248] The Act prohibits practices which "result in the denial of equal access to any phase of the electoral process

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voters); South Carolina v. Katzenbach, 383 U.S. 301, 325 (1966) (same); United States v. Uvalde Consol. Indep. School Dist., 625 F.2d 547, 556 (5th Cir.) (same), *reh'g denied*, 629 F.2d 1350 (5th Cir. 1980), *cert. denied*, 451 U.S. 1002 (1981); Riddell v. National Democratic Party, 508 F.2d 770, 776 (5th Cir. 1975) (same).

[242] Thornburg v. Gingles, 478 U.S. 30, 46-51 (1986).

[243] S. Rep. No. 417, 97th Cong. 2d Sess. at 27-28, 1982 U.S. Code Cong. & Admin. News at 204-06.

[244] *Id.* at 28, 1982 U.S. Code Cong. & Admin. News at 207.

[245] *Id.*, 1982 U.S. Code Cong. & Admin. News at 206.

[246] *Martin*, 658 F. Supp. at 1200.

[247] S. Rep. No. 417, 97th Cong., 2d Sess. at 18, 1982 U.S. Code Cong. & Admin. News at 195.

[248] *Id.*, 1982 U.S. Code Cong. & Admin. News at 195.

for minority group members."[249]

The state also asserted that some of the challenged statutes had been precleared by the United States Attorney General.[250] Therefore the litigants were prohibited from challenging the statutes on section 2 grounds.[251] The court summarily dismissed this argument and ruled that the black voters could bring their enforcement action.[252] The court, utilizing the three-part test of *Thornburg v. Gingles*,[253] found that blacks were geographically insular and politically cohesive, and that racial bloc voting by white voters operated to deny blacks equal access to the state's judiciary.[254] Thus, the court found that the use of multi-member, at-large method of electing chancery, circuit, and county court judges in certain districts in the western half of the state violated section 2 of the Act.[255] The court also held that the statutes creating and maintaining the at-large election method with numbered posts did not have a discriminatory purpose, and that the judicial district boundary lines were not discriminatory.[256]

The court entered a memorandum opinion and order on April 1, 1987, finding the at-large, multi-member judicial election method in the affected court districts had violated section 2 of the Act since blacks had less opportunity to participate in the political process and to elect judicial candidates of their choice.[257] In the remedy hearing, the black voters presented remedial plans, but the state offered no plan remedy.[258] The court was not pleased with the plaintiffs' proposed remedy and appointed an expert to assist in devising a remedy for the section 2 violations.[259] The court reopened the hearing to allow the plaintiffs to propose alternative remedial plans.[260] After a second remedy hearing, the court entered its memorandum opinion and order on September 12, 1988, adopting single-judge election districts within the multi-member judicial districts with an increase in the black population of at least one single-member election district within each affected judicial district.[261] The case was subsequently settled on December 29, 1988.

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[249] *Id.* at 30, 1982 U.S. CODE CONG. & ADMIN. NEWS at 207.

[250] *Martin*, 658 F. Supp. at 1200.

[251] *Id.* at 1199-1200.

[252] *Id.* at 1200.

[253] 478 U.S. 30 (1986).

[254] *Martin*, 658 F. Supp. at 1193-94.

[255] *Id.* at 1204-05.

[256] *Id.*

[257] *Id.*

[258] *Martin*, Memorandum Opinion and Order (Sept. 12, 1988).

[259] *Id.* Plaintiffs offered limited voting as an alternative remedy, as well as single-member, sub-election district with at least one sub-election district in each judicial district where a violation was found and having a black population of 65%. *Id.*

VIII. Conclusion

For more than a generation, black Mississippians have been seeking enforcement of the Voting Rights Act with vigor. Much of that enforcement effort has been met with stern resistance from the state and its political subdivisions. The names of the state officials may have changed, but the defensive tactics and results desired by the voters have remained the same. Mississippi should be proud to have a black Congressman, a black supreme court Justice, and almost 600 other black elected officials. However, the state should not forget that those officials have been elected only because Mississippians, with the aid of civil rights organizations and dedicated attorneys, have continued the struggle to ensure that all Mississippians will not only have the ballot, but will also be able to cast that ballot in an effective manner. For black Mississippians, having access to the ballot means having the chance to make a meaningful choice between candidates that include both the sons and daughters of former slaves and the sons and daughters of former slave owners. That day has not yet arrived.

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[260] *Id.*

[261] *Id.*

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COMMENTS

MISSISSIPPI'S STATUTES OF LIMITATIONS AND CHOICE OF LAW ANALYSIS: A BORROWED CONFLICT

I. Introduction

Following the footsteps of other plaintiffs whose claims had run in interested states,[1] Nevin Shewbrooks[2] filed suit in Hinds County Circuit Court on March 23, 1987[3] against eighteen co-defendants, all foreign corporations,[4] alleging exposure to asbestos at various locations in Delaware, New Jersey, and Pennsylvania.[5] The familiar process was to begin again: a foreign plaintiff, foreign defendants, and a cause of action which accrued in a state other than Mississippi.[6] In short, Mississippi would have no discernible interest in the subject matter of the suit or in the parties.[7] Yet, the Circuit Court of Hinds County was the unenviable choice of Nevin Shewbrooks due to Mississippi's plaintiff-oriented six-year statute of limitations[8] and its treatment of statutes of limitation in conflicts of laws analysis.[9] This comment will examine Mississippi's continued reliance on the traditional characterization of statutes of limitation. A legislative exception, Mississippi's borrowing statute, and certain judicial exceptions to the harshness of this traditional rule will be critically analyzed. The relationship between the current conflict of laws analysis and Mississippi's assertion of jurisdiction over foreign entities along with ensuing constitutional ramifications will be discussed. Modern approaches to treatment of statutes of limitations in a conflicts setting, including that proposed by the *Restatement (Second) of Conflict of Law* and the Uniform Statute of Limitations Act will be evaluated with regard to use in Mississippi. In conclusion, a recommendation for judicial action will be made to prevent Mississippi's continuance as a dumping ground for time-barred claims and to encourage the involvement in Mississippi's business community of litigation-wary defendants.

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[1] *See, e.g.*, Price v. Litton Systems, Inc., 784 F.2d 600 (5th Cir. 1986)(residents of Iowa and Texas injured in helicopter accident in Alabama by products manufactured in California or Virginia sued corporation doing business in Mississippi); Cowan v. Ford Motor Co., 694 F.2d 104 (5th Cir. 1982), *certification declined*, 437 So. 2d 47 (Miss. 1983)(non-resident plaintiff sued corporate defendant qualified to do business in Mississippi after fatal accident in Texas whose statute barred suit); Steele v. G.D. Searle & Co., 483 F.2d 339 (5th Cir. 1973), *remanded*, 422 F. Supp. 560 (S.D. Miss. 1976), *motion overruled*, 428 F. Supp. 646 (S.D. Miss. 1977)(cause of action accruing in Kansas to Kansas resident against defendant, doing business but not qualified to do so in Mississippi, brought in federal district court in Mississippi since Kansas' two year statute barred suit); Kershaw v. Sterling Drug, Inc., 415 F.2d 1009 (5th Cir. 1969)(Texas resident sued Delaware corporation qualified to do business in Mississippi in personal injury action after Texas' two year statute had run); Fieldman by Fieldman v. Roper Corp., 586 F. Supp. 936 (S.D. Miss. 1984)(Delaware corporation qualified to do business in Mississippi sued by minor resident of Kansas for injury in Kansas since statute barred suit in state of residence); Schreiber v. Allis-Chalmers Corp., 448 F. Supp. 1079 (1978), *rev'd*, 611 F.2d 790 (10th Cir. 1979)(Kansas resident sued Delaware corporation with business headquarters in Wisconsin in federal district court in Mississippi after suit barred by statute of limitations in Kansas).

[2] Shewbrooks v. A.C. and S. Inc., 529 So. 2d 557 (Miss. 1988). Nevin Shewbrooks and his wife Anna Mae filed suit in Delaware state court, Nevin seeking recovery for asbestosis and Anna Mae for loss of consortium. *Id.* at 568. When the Delaware court dismissed the claim as barred by the applicable limitations statute, the Shewbrooks sued again, with Anna Mae seeking recovery for asbestosis and Nevin for loss of consortium. *Id.*

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[3] *Id.* at 569. While the second suit was pending in Delaware, the Shewbrooks commenced an action in Hinds County Circuit Court asserting similar claims to those raised in Delaware. *Id.* Occasion for the instant suit was due to the Shewbrooks' "sleeping" through the expiration of the applicable statute of limitations and to MISS. CODE ANN. § 15-1-49 (1972), Mississippi's catchall six-year statute. *Id.* at 568.

[4] *Id.* at 569. Eleven of the eighteen foreign defendants were not qualified to do business in Mississippi following statutory procedures. *Id.* Of the eighteen, sixteen were asbestos manufacturers and two were owners of manufacturing facilities which had employed the Shewbrooks. *Id.*

[5] *Id.* at 568. Nevin Shewbrooks worked in Delaware, New Jersey and Pennsylvania from 1943 to 1978 during which time he contracted asbestosis. *Id.* Importantly, neither Nevin nor Anna Mae Shewbrooks had ever worked, lived or been exposed to asbestos in Mississippi. *Id.* at 569.

[6] *See supra* note 1.

[7] *Shewbrooks*, 529 So. 2d at 568 (Robertson, J., dissenting). The *Shewbrooks* case is an example of Mississippi's being a truly disinterested forum. *Id. See* Martin, *Statutes of Limitations and Rationality in the Conflict of Laws*, 19 WASHBURN L.J. 405, 417-18 (1980)(Mississippi in *Schreiber v. Allis Chalmers Corp.* described as disinterested for which no rational substantive or procedural interest existed to impose forum statute of limitations). Justice Anderson, dissenting in *Shewbrooks*, argued that the controversy had "as much to do with Mississippi as does a feud between two nomadic tribes in the Gobi desert." *Shewbrooks*, 529 So. 2d at 574 (Anderson, J., dissenting).

[8] MISS. CODE ANN. § 15-1-49 (1972) provides as follows:

> All actions for which no other period of limitation is prescribed shall be commenced within six years next after the causes of such action accrued, and not after.

Id.

During the 1988 regular legislative session in Mississippi, Rep. Capps McMillan introduced within a tort reform bill, presented in Judiciary Committee "A", a provision to shorten this statutory period to two years. H.R. No. 1065 § 46, Reg. Sess., Miss. Leg. 1988. Although a committee substitute changing the statutory period to four years passed the House on March 17, 1988, H.R. No. 785, Reg. Sess., Miss. Leg., 1988, and the Mississippi Senate shortened the period to two years, S.B. No. 2523, Reg. Sess., Miss. Leg., 1988, a conference committee failed to reach a compromise. This failure resulted in the death of the bill upon the expiration of the House calendar.

[9] *See infra* notes 10 through 39.

II. MISSISSIPPI'S CONFLICTS OF LAWS RULES

The conflicts of laws rules utilized in Mississippi are a mixture of traditional common-law concepts, legislative exceptions and judicial interpretations. Prior to 1968, Mississippi followed the traditional territorial approach of *lex loci delicti*[10] for tort claims and *lex loci contractus* for contract claims.[11] In *Craig v. Columbus Compress & Warehouse Co.*,[12] a contract action involving warehouse receipts[13], and more fully in *Mitchell v. Craft*,[14] a wrongful death action[15], the Mississippi Supreme Court adopted the "most significant relationship" test or "center of gravity" doctrine[16] which required application of the laws of the state with the "most significant relationship" to the event or parties.[17]

---

[10] RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (1934). The place of the wrong is "in the state where the last event necessary to make an actor liable for an alleged tort takes place." *Id. See* New Orleans and N.E.R.R. Co. v. Scogin, 243 Miss. 1, 137 So. 2d 539, 540 (1962) (law of place of injury controls); Wright v. Jacobs, 228 Miss. 641, 89 So. 2d 708, 709 (1956) (same); Covington v. Carley, 197 Miss. 535, 19 So. 2d 817, 817-18 (1944) (same); Montgomery and Atlanta Motor Freight Lines v. Morris, 193 Miss. 211, 7 So. 2d 826, 827, *suggestion of error overruled*, 193 Miss. 223, 8 So. 2d 502 (1942) (same); Welsh v. Kroger Grocery Co., 180 Miss. 89, 177 So. 41, 42 (1937) (same).

[11] RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 332 (1934). The FIRST RESTATEMENT adopted the "place of the making" rule which deemed the laws of the state where "the principal event necessary to make a contract occur" to be the governing law. *Id.* at § 311 comment d. *See also*, H. GOODRICH, HANDBOOK OF THE CONFLICT OF LAWS § 107 (3rd ed. 1949) (discussion of "place of making" problems).

[12] 210 So. 2d 645 (Miss. 1968).

[13] *Id.* at 646-47. *Craig* involved a suit by the holder of warehouse receipts, bought in Tennessee but stolen in Mississippi, against a Delaware corporation for the market value of ninety-three bales of cotton. *Id.* Since the cotton was warehoused in Mississippi, under Mississippi contracts, and all the interested parties were in Mississippi, the court concluded that Mississippi law should apply. *Id.* at 649.

[14] 211 So. 2d 509 (Miss. 1968).

[15] *Id.* at 510. *Mitchell* concerned a wrongful death action following an automobile accident in Louisiana involving decedents, both of whom were domiciled in Mississippi

Subsequent to *Mitchell* and *Craft*, Mississippi courts[18] and federal

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and whose estates were administered in Mississippi. *Id.* at 510.

[16] *Id.* at 515. The test adopted by the court was that of the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (Proposed Official Draft, Adopted May 24, 1968):

> § 145. The General Principle.
>
> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, as to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
>
> (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place where the injury occurred,
>
> (b) the place where the conduct causing the injury occurred,
>
> (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
>
> (d) the place where the relationship, if any, between the parties is centered.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Mitchell, 211 So. 2d at 515.

In determining which state bore the "most significant relationship," the court in *Mitchell* weighed the five choice-influencing factors set forth in Leflar, *Choice-Influencing Considerations in Conflicts of Law*, 41 N.Y.U.L. REV. 267, 282 (1966): "(1) predictability of results; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum governmental interests; and (5) application of "the better rule of law." *Mitchell*, 211 So. 2d at 513-14.

[17] *Mitchell*, 211 So. 2d. at 516. In evaluating the five factors, the court noted that the sole reason for utilizing Louisiana's law, the law of the place of the wrong, was its "certainty and predictability." *Id.* at 514. However, utilization of the substantive law of Mississippi, the state with the most significant relationship, would provide for consideration of Mississippi's governmental interest and policies. *Id.* At stake was whether Louisiana's contributory negligence doctrine or Mississippi's comparative negligence doctrine should govern. *Id. Cf.* Davis v. National Gypsum Co., 743 F.2d 1132, 1133 (1984) (*Mitchell* supports utilization of both law of place of injury or law of forum; Mississippi courts apply law of forum unless another state has more substantial relationship). The court concluded that while Louisiana would have no interest in having its law control nonresidents, Mississippi had substantial interest in having its own residents governed by forum law. *Mitchell*, 211 So. 2d at 514.

[18] *See, e.g.*, Boardman v. United Services Auto Ass'n, 470 So. 2d 1024, 1032 (Miss. 1985) (application of "center of gravity" test militated use of Nebraska law concerning whether insured's son was insured); Spragins v. Louise Plantation, Inc., 391 So. 2d 97, 99-100 (Miss. 1980) (court following "center of gravity" doctrine determined Arkansas to be state with "most substantial relationship" since all four farms and all contracts were located and negotiated there); Vick v. Cochran, 316 So. 2d 242, 244-46 (Miss. 1975) (Ala-

courts applying Mississippi law[19] have followed the "center of gravity" or "most significant relationship" test and have applied the appropriate state's substantive law in both tort and contract actions. Mississippi courts, however, have characterized statutes of limitations as procedural, not substantive, and therefore, have clung to the traditional common law treatment applying the law of the forum.[20] From *Hamilton v. Cooper*[21] in 1832 to the present, Mississippi courts have applied their own statutes of limitations even though another state's substantive law has been utilized.[22]

Exceptions to the mechanical application of forum law have been promulgated by both courts and legislature. The major legislative exception, section 15-1-65[23] of the Mississippi Code, the borrowing stat-

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bama law applied to suit concerning wreck occurring in Mississippi since Alabama had most substantial contracts); Turner v. Pickens, 235 So. 2d 272, 274 (Miss. 1970) (noting Mississippi's modification of place of injury rule requiring application of "center of gravity" doctrine all under similar factual situations). *But see*, White v. Malone Properties, Inc., 494 So. 2d 576, 578 (Miss. 1986) ("center of gravity" test discussed as inapplicable in worker's compensation cases).

[19] *See, e.g.*, *Price*, 784 F.2d at 602 (federal court sitting in Mississippi applied "center of gravity" doctrine utilizing Alabama substantive law); *Davis*, 743 F.2d at 1133 (since in diversity case federal court applied state substantive law, "center of gravity" doctrine indicated that law of Colorado should apply); Maryland Casualty Co. v. Integrity Ins. Co., 693 F.2d 506, 508 (5th Cir. 1982) (since Mississippi follows "center of gravity" rule, courts must consider each state's relationship to action); J. Russell Flowers, Inc. v. Itel Corp., 495 F. Supp. 88, 91 n.1 (N.D. Miss. 1980) (Mississippi's "most significant relationship" test determined which state's substantive law was applicable in contract dispute).

[20] *See infra* notes 40 through 79 and accompanying text. Both state and federal courts in Mississippi have treated statutes of limitations as procedural, subject to certain noted exceptions. *See, e.g.*, Kershaw v. Sterling Drug, Inc. 415 F. 2d 1009, 1011 (5th Cir. 1969) (Mississippi follows traditional rule that statutes of limitation are procedural and forum state's law applies); *Vick*, 316 So. 2d at 246 (Mississippi's statute of limitations, "by ancient precedent" governed by law of forum); Louisiana & Mississippi R. Transfer Co. v. Long, 159 Miss. 654, 131 So. 83, 88 (1930) (same).

[21] 1 Miss. (Walker) 542 (1832).

[22] *See, e.g. Price*, 784 F.2d at 605 (applying Alabama substantive law); *Davis*, 743 F.2d at 1133 (applying Colorado substantive law); *Steele*, 428 F. Supp. at 649 (applying Kansas substantive law); Cummings v. Cowan, 390 F. Supp. 1251, 1254 (N.D. Miss. 1975) (listing cases wherein Mississippi courts have enforced their own statutes of limitations while utilizing the substantive law of foreign jurisdiction).

[23] MISS. CODE ANN. § 15-1-65 (Supp. 1987) provides as follows:

> When a cause of action has accrued in some other state or in a foreign country, and by the law of such state or country, or of some other state and country where the defendant has resided before he resided in this state, an action thereon cannot be maintained by reason of lapse of time, then no action thereon shall be maintained in this state.

ute, was enacted in 1880. Borrowing statutes, in general, recognize the time limit from another jurisdiction, barring the suit in the forum state.[24] Most borrowing statutes look to the state in which the cause of action accrued with variations dependent upon residence of plaintiff or defendant.[25] Mississippi's statute, however, has narrow application[26] which alleviates only slightly the severity of the traditional approach for statutes of limitation. Meshing with the exception is section 15-1-63,[27] of the Mississippi Code, the tolling statute, amended in 1880 to

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Id.

During the 1988 Regular Legislative Session, an amendment to the borrowing statute was passed out of House Judiciary Committee "A," but died, never being brought to a vote on the floor of the House. The bill would have amended the statute to read: "When a cause of action has accrued *outside* of this state, and by the laws of *the place outside this state where such cause of action accrued*, an action thereon cannot be maintained by reason of lapse of time, then no action thereon shall be maintained in this state. (emphasis in original). Proposed H.R. No. 786, Reg. Sess, Miss. Leg. 1988.

[24] *See* Grossman, *Statutes of Limitations and the Conflict of Laws: Modern Analysis*, 1980 ARIZ. ST. L.J. 1, 14-15 (extensive discussion of borrowing statutes and their relation in general scheme of conflicts rules). Thirty-five jurisdictions currently have enacted borrowing statutes. Comment, *Wisconsin's Borrowing Statute: Did We Shortchange Ourselves?*, 70 MARQ. L. REV. 120, 124 n.33 (1986). Although several purposes of borrowing statutes have been suggested, the primary purpose appears to be prevention of forum-shopping. *Id.* at 122-23; *see also* Ester, *Borrowing Statutes of Limitation and Conflict of Laws*, 15 U. FLA. L. REV. 33, 40-41 (1962) (forum-shopping one of several policies supporting borrowing statutes); Note, *Conflict of Laws — An Interest Analysis Approach to Wyoming's Borrowing Statute*, 15 LAND & WATER L. REV. 717, 720 (1980) (borrowing statute primary method in preventing plaintiff's shopping for more lenient forum).

[25] Grossman, *supra* note 24, at 14. Classification of borrowing statutes is difficult because there is little uniformity within them. Comment, *supra* note 24, at 125-26. In fact, classification of the statutes by commentators has been as diverse as the statutes themselves. *See, e.g.*, Ester, *supra* note 24, app. at 79-84 (categorized by wide variety of factors); Vernon, *Statutes of Limitation in the Conflict of Laws: Borrowing Statute*; 32 ROCKY MTN. L. REV. 287, 288 n.6 (1960) (characterization by statutory language); Note, *Statutes of Limitation: Lex Loci or Lex Fori*, 47 VA. L. REV. 299, 308-09 (1961) (characterization by requirements).

[26] *Steele*, 428 F. Supp. at 649. The borrowing statute has been interpreted as applying only to defendants whose cause of action accrued in another state, was time-barred, and, subsequent to the bar, the defendant removed to Mississippi. Louisville & Nashville R.R. Co. v. Pool, 72 Miss. 487, 16 So. 753, 753 (1895). Additionally, Mississippi's statute does not apply to a person or "corporation that resided in or was qualified to do business in Mississippi at the time the cause of action arose." *Kershaw*, 415 F.2d at 1011. Thus, the statute is applicable to a narrow and limited class.

[27] MISS. CODE ANN. § 15-1-63 (1972) provides as follows:

> If, after any cause of action has accrued in this state, the person against whom it has accrued be absent from and reside out of the state, the time of his absence shall not be taken as any part of the time limited for the commencement

correlate with the borrowing statute.[28]

Two judicial exceptions to the general rule[29] formulated throughout the years provide for using the foreign jurisdiction's statute of limitations. The first of these is the "built in" test[30] which looks to the statute creating the right providing the cause of action. If the statute of limitations is "built into" the substantive law, or if the statute creating the right creates the time limit, Mississippi courts have deemed the limitation period to be substantive.[31] The second exception is the "foreign court" test[32] which arises when decisions and statutes of the foreign jurisdiction characterize the state's statute of limitations period as substantive. In such a situation Mississippi courts have applied the for-

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of the action, after he shall return.

Id.

[28] Robinson v. Moore, 76 Miss. 89, 23 So. 631, 633 (1898). In 1880 the legislature omitted the first clause of § 2157 (the current Miss. Code Ann. § 15-1-63) which stated: "If at anytime when any cause of action mentioned in this chapter, shall accrue against any person, he shall be out of state, the action may be commenced within the time herein limited therefor [sic], after such person shall have come into the state." *Robinson*, 23 So. at 633. Added to the amended statute in 1880 (§ 2678) were the words "in this state" after "accrued" in the first line. *Id.* The court stated that the "sound view" for this revision was the conflict between § 2157 and § 2754 (the current Miss. Code Ann. § 15-1-63). *Robinson*, 23 So. at 633.

[29] *See* Grossman, *supra* note 24, 12-13 (discussing four tests which determine whether foreign statutes of limitation are substantive or procedural: "built-in-test," "specificity test," "attributes test" and "foreign court test"); Wurfel, *Statutes of Limitations in the Conflict of Laws*, 52 N.C.L Rev. 489, 519 (1974) (six separate tests listed).

[30] Grossman, *supra* note 24, at 12. Examples of statutes creating rights, as well as limitations periods, are wrongful death statutes and worker's compensation acts. Under the "built in" test the limitation periods have been deemed to be substantive. *Id. See* The Harrisburg, 119 U.S. 199, 214 (1886), *overruled on other grounds*, (when liability and remedy created by same wrongful death statute, limitation of remedy is limitation of right). *See also* Montgomery v. Horneytown Fire Dep't, 265 N.C. 553, 555, 144 S.E.2d 586, 587 (1965) (similar treatment for North Carolina Workmen's Compensation Act).

[31] *See, e.g., Price*, 784 F.2d at 605 (when limitation "built in" or "in the same enactment", running of time extinguishes right as well as remedy); *Fieldman by Fieldman*, 586 F. Supp. at 938 (statute which creates right of action and supplies time limit binds Mississippi courts to foreign prescription). The "built in" exception was taken a step further in Ramsay v. Boeing Co., 432 F.2d 592 (5th Cir. 1970), in which the court held that regardless of whether the limitation was "built in", Mississippi courts would be bound by the foreign limitation if the statute conditioned "the existence of the right of action, rather than merely the pursuit of the remedy, in such a way as to extinguish the right. . . ." *Id.* at 597.

[32] Grossman, *supra* note 24, at 13. Another commentator believes this test to be the most preferred since it allows forum courts less leeway to manipulate their decisions regarding whether the limitation is substantive or procedural. Note, *supra* note 25, at 307-08.

eign limitation period.[33]

The final pieces in the puzzle of Mississippi's conflicts of laws rules are sections 15-1-3 and 15-1-49 of the Mississippi Code. Section 15-1-3[34] states that "completion of the period of limitation prescribed to bar *any* action" extinguishes not only the right but also the remedy. (emphasis added). While this statute has been interpreted to apply to mortgages and notes,[35] the Fifth Circuit in *Alabama Great Southern R.R. Co. v. Allied Chemical Corp.*[36] utilized it in a products liability action holding that Mississippi's general six year statute of limitations was substantive.[37] The general "catch-all" statute, section 15-1-49,[38] allowing a six year time limit within which to file suit, has become a torts statute[39] which, along with Mississippi's traditional procedural slant on statutes of limitations, has drawn innumerable suits to Mississippi court rooms.[40]

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[33] Perkins v. Guy, 55 Miss. 153, 177 (1877). *See also Steele*, 422 F. Supp. at 563 (Mississippi applied forum law where statute of state wherein cause of action accrued was deemed procedural).

[34] MISS. CODE ANN. § 15-1-3 (1972) provides:

> The completion of the period of limitation prescribed to bar any action, shall defeat and extinguish the right as well as the remedy. However, the former legal obligation shall be a sufficient consideration to uphold a new promise based thereon.

Id.

[35] Anderson - Tully Co. v. Brown, 383 So. 2d 1389, 1390 (Miss. 1980). In *Anderson - Tully Co.* the Mississippi Supreme Court, dealing with a judgment which had expired, stated that "as far back as 1895" when a limitations period had run, under MISS. CODE ANN. § 15-1-3, the right as well as the remedy was extinguished. *Id.* Therefore, the funds collected by Anderson - Tully pursuant to a garnishment order were to be turned over to Brown. *Id.* at 1391. *See also* Hawkins v. Southern Pipe and Supply Co., 259 So. 2d 696, 698 (Miss. 1972) (concerning assignment of life insurance policy to secure indebtedness); Payne v. Smith, 221 Miss. 138, 72 So. 2d 234, 236 (1954) (concerning trust deed); Proctor v. Hart, 72 Miss. 288, 16 So. 595, 596 (1895) (concerning note for rent).

[36] 467 F.2d 679 (5th Cir. 1972), *rev'd on other issues*, 501 F.2d 94 (5th Cir. 1974).

[37] *Id.* at 682. In *Alabama Great Southern Railroad* the Fifth Circuit interpreted Mississippi's statute of limitations as substantive, thereby applying not only Mississippi's substantive law (since it was the place of the wrong), but also its six-year limitation statute. *Id.*

[38] *See supra* note 8.

[39] *Shewbrooks*, 529 So. 2d at 568 (Robertson, J., dissenting). Justice Robertson commented that the general statute of limitations was never meant to be a torts statute. *Id.*

[40] *Id.* The combination of a lengthy statute, characterization of statutes of limitations as procedural, and Mississippi's long arm statute which gives jurisdiction to state courts over corporations not qualified, but doing business in the state, has transformed Mississippi's courts into havens for plaintiffs promoting stale claims against multi-state corporations.

III. The Traditional Approach to Substance and Procedure

Mississippi's conflict of laws rules result from compliance with originally valid traditional judicial interpretation which after centuries has outlived its utility and policy rationale.[41] A study of the history of these rules is "the first step toward an enlightened skepticism," necessitating "a deliberate reconsideration of the worth of those rules."[42] The rule of Anglo-American Law that statutes of limitation are procedural in character was adopted from Dutch writers in the seventeenth century.[43] This distinction between substance and procedure, contrary to the continental view, was firmly established in the American colonies by the late eighteenth century.[44]

Difficulty has arisen in determining the boundaries of substance and procedure. Procedure is defined to be those rules "which concern methods of presenting to a court the operative facts upon which legal relations depend."[45] The balance of the law, those rules "which concern the legal effect of those facts after they have been established," is deemed to be substantive.[46] Furthermore, statutes of limitation, it has been argued, affect only the remedy and not the substantive right.[47] Despite definitions, however, courts and commentators have been unable to distinguish clearly between the two, as substance often "shades off" into procedure.[48] The forced dichotomy is particularly apparent regarding statutes of limitations as such statutes manifest both substantive and procedural functions.[49]

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[41] *See* Comment, *The State of Limitations and the Conflict of Laws*, 28 Yale L. J., 492, 492 (1918-19) (idea of statutes of limitations as procedural established so firmly as to be regarded universal rule far from truth). Even in the early twentieth century commentators and courts were strongly divided over the issue of substance-procedure dichotomy. *Id.*

[42] Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897).

[43] Dupleix v. De Roven, 23 Eng. Rep. 950 (1705). *See* Comment, *supra* note 41, at 492 (Dutch law philosophers broke with older more general continental view). The first Dutch writer to break with the traditional view was Paul Vost, followed by Huber and John Voit. *Id.* While the Anglo-American view was simpler, always applying forum law, the continental view treated statutes of limitations as a question affecting the substantive rights of parties. *Id. See generally*, Grossman, *supra* note 24, at 5 (English common law courts adopted Dutch writers' broad view of "procedure" in order to restrict recognition of foreign rights created by civil law).

[44] *See* M'Elmoyle v. Cohen, 38 U.S. (13 Pet.) 312, 328 (1839) (statute of limitations is plea to remedy and, therefore considered procedural).

[45] G. Stumberg, Conflict of Laws 133 (3rd ed. 1963). *See also* Grossman, *supra* note 24, at 6 (substantive law deals with ends sought by litigation, while procedure deals with means towards end), *citing* J. Salmond, Jurisprudence 437-38 (6th ed. 1920).

[46] Stumberg, *supra* note 45, at 133.

[47] *See* Leflar, *The New Conflicts-Limitations Action*, 35 Mercer L. Rev. 461, 462 (1983-84) (theory that limitation laws affect right only and not remedy unrealistic, though generally accepted.)

In American courts forum procedural rules in conflicts settings have been applied mechanically, without explanation or justification making results in future cases unpredictable and depriving the public of confidence in judicial process.[50] The original *Restatement of Conflict of Laws* utilized the traditional procedural characterization for statutes of limitations.[51] In 1979, the *Restatement (Second) of Conflict of Laws*, while denigrating the entire substance-procedure characterization, nevertheless failed to reject it entirely and continued its recognition of statutes of limitations as procedural.[52] However, in the proposed revisions to the *Restatement (Second) of Conflict of Laws* (1986), section 142 has adopted the "most substantial relationship" test for statutes of limitations analysis.[53] Comment g of the revisions indicates that the traditional procedural characterization has been abandoned. Instead, the forum court, whose statute does not bar suit, would entertain an action only when the action would advance a forum interest without seriously interfering with the rights of the foreign state. This would occur when the forum state had the most significant relationship to the important issues in the suit.[54] Alternately, when the forum court has slight or no contact with the suit, the action should be barred, despite the existence of a longer statute in the forum state.[55]

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[48] *See* Cook, *"Substance" and "Procedure" in Conflict of Laws*, 42 YALE L.J. 333, 343 (1933) (substance "shades off by imperceptible degrees" into procedure). Some rules which are deemed procedural affect the results in some cases. *See* Grossman, *supra* note 24, at 6, *citing* Busik v. Levine, 63 N.J. 351, 358, 307 A.2d 571, 578 (1973) (prejudgment interest). Additionally, the words "substance" and "procedure" change according to the context in which they are used. *See* Weintraub, *The Erie Doctrine and State Conflict of Laws Rules, 39* IND. L. J. 228, 232 (1964) ("substance and 'procedure' are chameleon-like words, changing their meaning dramatically with changed contexts.")

[49] *See* Milhollen, *Interest Analysis and Conflicts Between Statutes of Limitation*, 27 HASTINGS L.J. 1, 10 (1976) (procedural interest is forum interest in judicial economy; substantive interest is policy of affording defendant repose).

[50] *See* Cooper, *Statutes of Limitations in Minnesota Choice of Law: The Problematic Return of the Substance-Procedure Distinction*, 71 MINN. L. REV. 363, 372 (1986) (characterization of limitation periods as substantive or procedural "eludes principled analysis"). *See also* VERNON, CONFLICT OF LAWS § 3.02 (2d ed. 1987) (application of forum procedural rules termed "slot-machine" jurisprudence).

[51] RESTATEMENT OF CONFLICT OF LAWS § 603 and comment a, § 604 (1934). The FIRST RESTATEMENT reflected the policy interest of the forum state that substantial justice could be achieved only within the specified time period. *Id.*

[52] RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 142 (1971). In comment b to § 122 of the RESTATEMENT (SECOND) the reporters recognized how characterizations, although themselves harmless, have "led some courts into unthinking adherence to precedents . . . regardless of what purposes were involved in the earlier classifications." *Id.*

[53] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 (1986 Revision, Supp. 1988). In May 1987 the American Law Institute reconsidered a proposed revision of § 142 which was presented initially to the ALI in May, 1986. *Id.* at vii (Hazard, Director). Upon a discussion concerning the proposal in 1986, sufficient uncertainties had arisen to convince the Council to reconsider what the black letter law should be and reformulate its proposals. *Id.* Although the committee was unable to agree in 1987, the subsequent proposal was submitted during the May 1988 meeting:

§ 142. Statute of Limitations

Mississippi has not followed the *Restatement (Second)* proposed revisions. As recently as 1988, in *Shewbrooks*, a seemingly perfect case for reevaluating its approach to the substance-procedure dichotomy, the Mississippi Supreme Court was unable to break the mold.[56] Yet Mississippi is a prime candidate for adoption of the modern approach. As the court has already chosen the "most substantial relationship" test to guide its selection of substantive law in a conflicts setting,[57] further adoption of the foreign limitations period would pose no difficulty.

> Whether a claim will be maintained against the defense of the statute of limitations is determined under the principles stated in § 6. In general:
>
> (1) The forum will apply its own statute of limitations barring the claim unless the exceptional circumstances of the case make such a result unreasonable.
>
> (2) The forum will apply its own statute of limitations permitting the claim unless:
>
> (a) maintenance of the claim would serve no significant interest of the forum; and
>
> (b) the claim would be barred under the statute of limitations of a state having a more significant relationship to the parties and the occurrence.

Restatement (Second) of Conflicts of Law, § 142 (1986 Revisions, Supp. 1988). With minor revisions the committee approved the 1988 amended revisions. Conversation with Mike Greenwald, American Law Institute, August 24, 1988.

[54] Restatement (Second) of Conflict of Laws comment g.

[55] *Id.* In *Shewbrooks*, Justice Robertson in his dissent applauded the revisions which he felt comported well with his concurrence in White v. Malone Properties, Inc., 494 So. 2d. 576, 579-83 (Miss. 1986). *Shewbrooks*, 529 So. 2d at 571-72 (Robertson J., dissenting). Particularly cited for approval was the statement that action should not be entertained if a forum had no contacts with the case excepting that the defendant had done unrelated business and had appointed an agent to receive process. *Id.* at 572-73 (Robertson, J., dissenting).

[56] *Shewbrooks*, 529 So. 2d at 559. The *Shewbrooks* case in its original hearing was dismissed on the basis of *forum non conveniens*. *Id.* While Justice Anderson dismissed the suit based on *forum non conveniens*, Justice Robertson concurred based on the fact that Mississippi was not the state with the most significant relationship and had no interest in maintenance of the action. *Id.* at 570-74 (Robertson, J., concurring).

[57] See *Mitchell*, 211 So. 2d at 515 (first application of "most substantial relationship" doctrine by Mississippi Supreme Court in torts case).

Since the entire substance-procedure characterization is judicially created,[58] the matter falls within the purview of the judiciary. Courts appear better suited than legislatures to move rapidly and imaginatively in remedying the situation.[59]

The reasons for the adoption of the substance-procedure dichotomy are many and varied, valid at inception yet outworn in application. The rationale for the substance-procedure dichotomy in eighteenth century England stemmed from a judicial reluctance to adopt rights recognized in foreign courts.[60] Early English courts enthusiastically adopted the Dutch writers' wide application of "procedure", enabling them to restrict the application of foreign law in English common law courts.[61] This broad interpretation of statutes of limitations as procedural has resulted in centuries of erroneous procedural characterization. Ironically, however, the progenitor of the traditional view has revised its interpretation. In the Foreign Limitation Periods Act of 1984,[62] England changed its position fundamentally. Henceforth, when foreign substantive law is applicable in a conflicts situation, English courts will also utilize the foreign limitation period.[63]

An oft stated reason for the traditional characterization is that treating limitations periods as procedural will aid the judicial efficiency of the forum state. The basic premise that a forum state should apply its own procedure to facilitate the effectiveness of its judicial machinery is undeniable.[64] It would be most difficult for Mississippi when its conflicts of laws rules indicate adoption of New York's substantive law to also utilize New York's procedural rules for pleading, motions, or evidence. A rationalization, however, that convenience is the basis for application of a forum's statute of limitations breaks down, as ascertaining the length of the limitations period is no more difficult than determining a foreign state's substantive law.[65]

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[58] *See supra* notes 43-44 and accompanying text. *See also* Heavner v. Uniroyal, 63 N.J. 130, 305 A. 2d 412, 415 (1973) (procedural characterization of statutes of limitation is "judge-made and may be changed judicially").

[59] *See* Carter, *The Foreign Limitation Periods Act 1984*, 101 LAW Q. REV. 68, 78 (1985) (properly employed case law techniques more suitable than techniques of legislators).

[60] *See* Grossman, *supra* note 24, at 10 (English common law courts which had developed in geographical isolation resisted operation of foreign law by adopting substance-procedure characterization). *See generally* Comment, *supra* note 41, at 496 (natural for English court to resist operation of foreign law).

[61] *See* Lorenzen, *The Statute of Frauds and the Conflict of Laws*, 32 YALE L.J. 311, 327 (1923) (Dutch scholars gave "procedure" wide application). The broadness of the definition employed by English courts is exemplified by the following quote:

> English lawyers give the widest possible extension to the meaning of the term "procedure". The expression, as interpreted by our judges, includes all legal remedies, and everything connected with the enforcement of a right.

Id., *quoting* DICEY, CONFLICT OF LAWS, 762 (3rd ed. 1922).

[62] *See* Carter, *supra* note 59, at 68-69 (Act is improvement on "previously existing common law situation").

[63] *Id.* at 69.

[64] *Heavner*, 63 N.J. 130, 305 A.2d at 415. In *Heavner*, a products liability action, the

Furthermore, statutes of limitations are dissimilar to other rules of procedure. Statutes of limitations, unlike rules of pleading or practice, have a substantive effect, since they terminate enforceable rights.[66] In comparing statutes of limitations to the definition of procedure, limitation periods do not "concern methods of presenting to a court the operative facts upon which legal relations depend."[67] Instead, limitations periods "concern the legal effect (suit barred) of those facts (plaintiff did not file within time limit) after they have been established."[68]

A final rationale for imposing the substance-procedure characterization concerns the right-remedy distinction. As previously mentioned, statutes of limitation have been deemed to bar the substantive right, but not the remedy, therefore, being procedural.[69] This rationale appears erroneous and illogical. There is no such thing (at law) as a right without a remedy. Such a right would have little value.[70] Furthermore, a right barred where it arose should not be resurrected in a state with a longer limitation period.[71]

This right-remedy discussion makes even less sense when viewed in the light of section 15-1-3 of the Mississippi Code which states that in Mississippi "completion of a limitation period . . . defeat[s] and ex-

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New Jersey Supreme Court while concurring that "sound sense and practical reasons" justified using forum rules for strictly procedural matters, adopted a more modern analysis and "borrowed" the limitation period of North Carolina. *Id.* at 418; *see generally*, R. Leflar, American Conflicts Law, § 121 at 289 (3rd ed. 1977) (irrational to apply foreign procedural law in forum court).

[65] *See* Grossman, *supra* note 24, at 17 (judicial process of forum undisturbed by application of foreign limitations period).

[66] *See* Leflar, *supra* note 64, at § 127 (statutes of limitations go to heart of action).

[67] Stumberg, *supra* note 45, at 133.

[68] *Id.*

[69] *See supra* note 47 and accompanying text.

[70] *See also* Sedler, *The Erie Outcome Test as a Guide to Substance and Procedure in the Conflict of Laws*, 37 N.Y.U.L. Rev. 813, 846-51 (1962) (right-remedy distinction serves no real purpose). Sedler has labeled the right-remedy distinction a "prior hatching" situation, noting that it represents "nothing more than a bad example of whether the proverbial chicken came before the proverbial egg." *Id.* at 846.

[71] *See* Comment, *supra* note 41, at 496-97 (after enforcement of right of action gone, same consequences should attach everywhere).

tinguish[es] the right as well as the remedy."[72] A reading of the statute makes it difficult to reconcile the distinction between barring the right and the remedy and the procedural treatment of limitation periods in Mississippi. Even though the judicial interpretation of the statute has been that it refers to notes and mortgages, the Fifth Circuit did utilize the statute in an action for injuries, finding Mississippi's general statute of limitations was substantive.[73]

Several criticisms have been leveled at the traditional rule, the major being that it encourages forum-shopping.[74] Successful forum-shopping, occurring due to the different lengths of limitations periods, is contrary to the conflicts of laws goal of consistency and predictability of results.[75] Other criticisms include that its approach is utilized for historical reasons only[76] and that its mechanical application fails to recognize policy considerations of the foreign state.[77] Additionally, commentators have argued that a statute of limitations is an issue of law, which is outcome-determinative and to which courts should apply a choice of law analysis.[78] When outcome-determination becomes a factor and the forum court lacks significant contacts with the litigation, courts become wary of crossing the line into unconstitutional areas.[79]

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[72] *See supra* note 34.

[73] *See supra* note 36 and accompanying text.

[74] *See* Grossman, *supra* note 24, at 16 (plaintiff by careful forum-shopping able to choose outcome different from that of state wherein cause of action arose).

[75] *Id.*

[76] Bournias v. Atlantic Maritime Co., 220 F.2d 152, 154 (2nd Cir. 1955). *See* GOODRICH, CONFLICT OF LAWS § 85 (4th ed. 1964) (substance-procedural dichotomy result of history). Most of the major scholars in conflicts of laws have criticized the substance-procedure characterization. *See Heavner*, 63 N.J. 130, 305 A.2d 412, 416-17 (1973) (discussion of criticism of characterization). *But see* Ailes, *Limitation of Actions and the Conflict of Laws*, 31 MICH. L. REV. 474, 502 (1933) (approving characterization of statutes of limitation as procedural).

[77] *See* Vernon, *supra* note 25, at 290-91 (courts divorced from consideration of competing interests when utilizing common law rule of application of local statutory time period). Several jurisdictions have recognized this criticism by adopting an interest analysis approach to statutes of limitation in a conflicts setting. In *Heavner*, the New Jersey Supreme Court, which had already rejected the traditional approach for determining substantive law, held that since New Jersey had no substantial interest in the litigation, both the substantive law and the limitations period of North Carolina would apply. *Heavner*, 63 N. J. at 141, 305 A.2d at 418. *See generally* Allen v. Volkswagen of America, Inc., 555 F.2d 361, 362-63 (3rd Cir. 1977) (interest analysis utilized pointed to no substantial interest in New Jersey); Henry v. Richardson-Merrill, Inc., 508 F.2d 28, 32 (3rd Cir. 1975) (court followed two step process determining governmental connections between parties and jurisdictions); *but see* Schum v. Bailey, 578 F.2d 493, 494-95 (3rd Cir. 1978) (interest analysis favored statute of limitations of forum state). *See also White*, 494 So. 2d at 582 (Robertson, J., concurring) (comparing interest analysis in *Henry v. Richardson-Merrill, Inc.* to Mississippi analysis concerning state interest in prevention of forum-shopping and over-crowded dockets).

IV. LEGISLATIVE AND JUDICIAL EXCEPTIONS TO MISSISSIPPI'S TRADITIONAL CHARACTERIZATION OF CONFLICTS OF LAWS RULES

A. Legislative Exceptions

Due to the deep entrenchment of the procedural characterization of statutes of limitation in American jurisprudence, courts and legislatures, rather than meet the dilemma head on, have been forced to achieve fairer results by formulating exceptions to the common law *lex fori* approach. Legislatures of the majority of the fifty states have reacted to the traditional application of forum law by enacting "borrowing statutes"[80] which, by and large, refer to the statute of limitation of the foreign state.[81] While the language of borrowing statutes varies according to the jurisdiction, most utilize the law of the state wherein the cause of action accrued or contain variations depending upon the residence of the parties.[82] Policy considerations encouraging adoption of borrowing statutes include uniformity of results,[83] prevention of forum-shopping,[84] recognition of competing interests of the foreign and the forum state,[85] judicial economy,[86] desire for achieving fair results,[87] and encouragement of immigration.[88]

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[78] *See* Grossman, *supra* note 24, at 19 (since limitation period affects outcome, analysis necessary). Justice Robertson, concurring in *White v. Malone Properties, Inc.*, emphasized that the important consideration for courts was not whether a limitation period was substantive or procedural, but whether the issue of statutes of limitation affected the choice of the forum. *White*, 494 So. 2d at 582. An affirmative answer to such a question would direct the decision of the court to the limitation period of the state "which lies in the center of gravity." *Id. See also* Sedler, *supra* note 70, at 880 (*Erie* outcome test furnishes sound guidance).

[79] *See* LEFLAR, *supra* note 64, at § 120 ("different questions are encountered . . . when issues that may be outcome determinative, such as . . . statute of limitations . . . are characterized as procedural").

[80] *See supra* note 23, 24 and accompanying text.

[81] *See* Vernon, *supra* note 25, at 298 (effect of borrowing statute is to import into law of forum state "limitations of other states which have barred action there"), *citing* Crow v. Hartzler, 103 Kan. 800, 176 P. 651, 652 (1918).

[82] *See* Vernon, *supra* note 25, at 300 (though most borrowing statutes utilize time bar of state where claim arose, no consistent pattern emerges).

[83] *See* Grossman, *supra* note 24, at 14-15 (basing time limit for suit on state law wherein cause of action arose supplements policy of uniform results). *See also* Ester, *supra* note 24, at 40-41 (various reasons for enactment of borrowing statutes).

[84] *See* Coen v. Ambrose-Augusterfer Corp., 463 A.2d 265, 267-68 (Del. Super. Ct. 1983) (another name for borrowing statutes is "anti-forum" shopping statutes); *see generally* Case Comment, OVELLETTE v. STURM, RUGER AND CO. and JONES v. NORTH AMERICAN AERODYNAMICS: *The Effectiveness of Maine's Borrowing Statute in Cases Involving*

Mississippi's statute,[89] enacted in 1880, is unusual in two respects: 1) it is only remotely similar to that of one other state - Iowa,[90] and 2) it has been given an "exceptionally uncommon interpretation."[91] The former aspect does not detract from its utility, as an application of the statute's plain meaning would fulfill the general purpose of borrowing legislation as well as the principles of conflicts of laws.[92] The latter aspect, however, has narrowed the utility of the provision and contributed to the "current influx" of litigation with which Mississippi has virtually no contacts. The statute, as interpreted by the Mississippi Supreme Court, does not apply to most cases.[93]

Since legislative history on the subject is virtually nonexistent, the purpose of the Mississippi Legislature in 1880 must be gleaned from

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Corporations, 37 ME. L. REV. 210, 213 (1985) (enactment of borrowing statute clearly response to forum shopping).

[85] *See* Comment, *supra* note 24, at 124-25 (balance needed between forum state interest of providing plaintiff with reasonable time to bring suit or foreclosing stale claims and alternate interest of state of cause of action's accrual).

[86] *See White*, 494 So. 2d at 582 (Robertson, J., concurring) (Mississippi's interest in seeing that "overcrowded dockets are not further clogged" exemplified by borrowing statute); Wing v. Wiltsee, 47 Nev. 350, 359, 223 P. 334, 336 (1924) (Nevada court felt borrowing statute would discourage non-residents from litigating in forum, thereby unclogging courts).

[87] *See Robinson*, 76 Miss. at 103, 23 So. at 633 (unfair to expose defendant to suit in forum after running of time in state where previously resident).

[88] *See Id.* (purpose of Mississippi statute to encourage immigration).

[89] MISS. CODE ANN. § 15-1-65 (Supp. 1987). *See supra* note 23.

[90] IOWA CODE ANN. § 614.7 (1958). Iowa follows the same general pattern as Mississippi, although it does not refer to the defendant's becoming a resident of Iowa. *Id. See generally* Vernon, *supra* note 25, at 315-17 ("prime advantage" of Iowa's statute is its reasonably certain cut-off date).

[91] Ferens v. Deere and Co., 819 F.2d 423, 425 (3rd Cir. 1987). *Accord* Vernon, *supra* note 25, at 316 (interpretation of Mississippi's borrowing statute open to "serious question").

[92] *See* Comment, *supra* note 24, at 125 (as many borrowing statutes exist as jurisdictions which enacted them).

[93] Brief for Appellees at 25, *Shewbrooks*, (No. 56,014). The majority of defendants do not fall within the class to which the borrowing statute is applicable. *See, e.g.*, *Ferens*, 819 F.2d at 425-26 (borrowing statute inapplicable since Deere qualified to do business in Mississippi); *Cowan*, 719 F.2d at 786 (applying Mississippi Supreme Court's interpretation of borrowing statute); *Kershaw*, 415 F.2d at 1011 (borrowing statutes inapplicable); *Cummings*, 390 F. Supp. at 1254 (same). *But see* Jackson v. National Semi-Conductor Data Checker/DTS, Inc., 660 F. Supp. 65, 69 (S.D. Miss. 1986) (corporation not resident or qualified to do business in Mississippi when cause of action accrued, therefore, borrowing statute applied).

cases and briefs interpreting the statute. According to the Mississippi Supreme Court in *Robinson v. Moore*,[94] section 2754 (section 15-1-65 of the Mississippi Code)[95] was enacted in response to the court's decision in *Perkins v. Guy*.[96] In *Perkins*, both creditor and debtor had been residents of Tennessee for the full period of Tennessee's statute of limitations.[97] Yet upon the debtor's death the creditor brought suit upon the decedent's representative in Mississippi, prevailing in his suit since the Mississippi statute was held to apply.[98] The *Perkins* court reasoned that the legislature might consider it "wise to alter the rule where both parties were resident in another state whose statute had barred the remedy."[99] Thereafter, the legislature enacted section 2754 "in response presumably to that suggestion."[100]

A plain reading of the current statute, virtually unchanged since 1880, indicates that it is susceptible to two interpretations.[101] The first interpretation coincides with the minimal legislative history available: that when a cause of action accrues in another state, a defendant, who is a resident of that state or some other, will receive the benefit of the bar of the statute of limitations in that state.[102] The second interpretation, given the statute in 1885 by the court in *Louisville & N.R. Co. v. Pool*,[103] is that a "non-resident [is] protected by the bar of the statute of limitations of the state or country in which he has resided against a cause of action there arising who afterwards moves into this state."[104]

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[94] *See supra* note 28 and accompanying text.

[95] *See supra* note 23. Section 2754 is virtually identical to the current MISS. CODE ANN. § 15-1-65 with the exception being the placement of commas. In the original statute there were seven commas and in the current version only four. *Id.*

[96] 55 Miss. 153 (1877).

[97] *Id.* at 173.

[98] *Id.* at 154-56.

[99] *Id.* at 176. The court also noted that in suits based upon contract, it would give effect to a foreign statute barring the remedy in another state where the parties were resident. *Id.* at 177.

[100] *Robinson*, 76 Miss. at 103, 23 So. at 633.

[101] Brief for Appellees at 21-23, *Shewbrooks*, (No. 56,014).

[102] *Vick*, 316 So. 2d at 246. In *Vick* an Alabama plaintiff whose statute had run in the state of his residence, brought suit in Mississippi for damages after a wreck in northern Mississippi. *Id.* at 244. The Mississippi Supreme Court summarized the borrowing statute as providing that "a cause of action arising in a foreign state or country, and which is barred by that state or country, shall be barred in Mississippi." *Id.* at 246.

[103] 72 Miss. 487, 16 So. 753 (1895).

[104] *Id.* The appellant railway company in *Pool* endeavored to use Alabama's statute of limitations in an action to recover damages for cattle killed by its train. *Id.* The Mississippi Supreme Court held, however, that § 2754 did not apply, as the railroad was a corporation, resident in both Alabama and Mississippi. *Id.* This initial interpretation of §

Although the existence of the conjunction "or" indicates two alternative interpretations for section 15-1-65, only the *Pool* interpretation has been adhered to by the Mississippi Supreme Court.[105] The borrowing statute has been held to benefit only a person (including an artificial person such as a corporation) who has become a Mississippi resident after the statute of limitations has run against him in another state wherein the cause of action accrued.[106] Additionally, the person or corporation must not have been a resident when the cause of action accrued.[107] Therefore, the class of persons or businesses able to avail itself of the benefits of borrowing legislation is very limited, giving the Mississippi statute a distinct slant towards plaintiffs and damaging most defendants.[108]

The current interpretation of the borrowing statute has been at issue in both the courts and the legislature on numerous occasions since the adoption of a modern approach in Mississippi for choice of substantive law.[109] As recently as 1987 in the *Shewbrooks* case Justice Robertson, while recognizing that the borrowing statute did not control in that case, indicated that the statute reflected *in principle* the second interpretation appropriate to section 15-1-65: that where an action in Mississippi is governed by the substantive law of the foreign state, the statute of limitations of that state should be used also.[110]

15-1-65 "disfigur[ing] the statute," has continued to the present. Brief for Appellee at 22, *Shewbrooks*, (No. 56,014).

[105] *Kershaw*, 415 F.2d at 1011, *citing* Louisiana and Miss. R. Transfer Co. v. Long, 159 Miss. 654, 131 So. 84 (1930). Essentially what the *Pool* court did was to omit the phrase "or of some other state and country," thereby leaving only one interpretation. Brief for Appellee at 22, *Shewbrooks*, (No. 56,014).

[106] *Jackson*, 660 F. Supp. at 67. In *Jackson* the defendant corporation did not become a resident of Mississippi until June 30, 1983, six months after the cause of action arose on January 23, 1983. *Id.* at 67. Therefore, § 15-1-65 was applicable. *Id.*

[107] *Cummings*, 390 F. Supp. at 1254. In *Cummings* the defendants and their insurers, in a wrongful death action arising in Tennessee, sought use of Mississippi's borrowing statute in order to find plaintiff's suit time barred under Tennessee's one-year limitation period. *Id.* at 1253-54. The federal district court, however, found that since both defendants had been residents of Mississippi at the time of the accident and continuously since, following *Pool*, the borrowing statute would not apply. *Id.* at 1254.

[108] Brief for Appellees at 21, *Shewbrooks*, (No. 56,014). Many national and international corporations are "doing business" or have qualified with the Secretary of State to do business in Mississippi. Therefore, any of these corporations, if sued in Mississippi, will be unable to use the borrowing statute and therefore, will be drawn into Mississippi courts by numerous foreign plaintiffs. *Id.*

[109] *See supra* notes 91-107 and accompanying text. *See also White*, 494 So. 2d at 579-83 (Robertson, J., concurring) (analogy of Mississippi's borrowing statute to Louisiana limitations periods as indicative of similar principles).

[110] *Shewbrooks*, 529 So. 2d at 570 (Robertson, J., dissenting).

In disagreeing with such a reading of the borrowing statute, Justice Hawkins in *Shewbrooks* advocated a legislative reinterpretation rather than a judicial one.[111] This preference for legislative action was heeded in the 1988 Regular Session of the Mississippi Legislature. The tort reform bill proposed in House Judiciary Committee "A" contained an amendment to the borrowing statute which would have adopted the limitations period of the state wherein the cause of action accrued.[112] However, this amendment, as has the bulk of tort reform in Mississippi, died before reaching a vote on the floor of the House.

B. *Judicial Exceptions*

Finding the traditional approach of application of forum law mechanical, courts have developed certain exceptions to the rule.[113] Mississippi courts utilize two of these exceptions, both stemming from the right/remedy distinction,[114] in determining which state's limitation period to apply: the "built in" test[115] and the "foreign court" test.[116] In the "built in" test, Mississippi courts determine whether the statute providing the cause of action also limits it.[117] If so, the limitation period is deemed to be such an integral part of the substantive law that a running of the time period extinguishes the right.[118] In *Bethlehem Steel Co. v. Payne*,[119] the Mississippi Supreme Court, following the "built in" test, concluded that the claim under the Louisiana Workmen's Compensation Act was barred since the time period in which suit might be brought was "built in" or "in the same enactment."[120]

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[111] *Id.* at 568 (Hawkins, J.) In deferring to the legislature, Justice Hawkins nevertheless appeared to indicate some measure of approval of a revised interpretation of the borrowing statute since he appendixed to his opinion a copy of the Uniform Conflict of Laws — Limitations Act, the terms of which are consistent with the approach advocated by proposed revisions to § 142 of the RESTATEMENT (SECOND) and by Justice Robertson's concurrence. *Shewbrooks*, 529 So. 2d at 567-68.

[112] Proposed H.R. No. 786, 49 Reg. Sess., Miss. Leg. 1988. The proposed amendment stated:

> When a cause has accrued *outside of this* state, and by the laws of *the place outside this state where such cause of action accrued*, an action thereon cannot be maintained by reason of lapse of time, then no action thereon shall be maintained in this state.(emphasis in original).

Id.

[113] *See* Davis v. Mills, 194 U.S. 451, 454 (1904) (limitation goes to right and accompanies allegation — "specificity" test); The Harrisburg, 119 U.S. 199, 214 (1886), *overruled on other grounds*, (involving limitation included in wrongful death statute — "built in" test); Ramsay v. Boeing Co., 432 F.2d 592, 598-99 (5th Cir. 1970) (whether foreign jurisdiction considers limitation period as substantive or procedural — "foreign court" test).

[114] *See* Grossman, *supra* note 24, at 12 (use of forum statute of limitations justified since time bar affects only remedy rather than right).

[115] *See supra* notes 30 and 31 and accompanying text.

[116] *See supra* notes 32 and 33 and accompanying text.

[117] *Cummings*, 390 F. Supp. at 1255. While finding that Mississippi courts indeed recognize as substantive statutes of limitations which are "an integral part of the cause of action itself," the court ruled that Tennessee's wrongful death statute contained no "built in" period. *Id.* Overlapping the "built in" test with the "foreign court test", the

The second judicial exception, the "foreign court" test, concerns whether the decisions of foreign courts characterize statutes of limitations as substantive or procedural.[121] Mississippi courts have honored the construction adhered to by foreign courts in determining the appropriate statute of limitations period.[122] In *Price v. Litton Systems, Inc.*[123] the Fifth Circuit, sitting as a Mississippi court, used both "built in" and "foreign court" tests in considering the Alabama wrongful death statute.[124] Since a two year time period was "built into" Alabama's wrongful death statute and since Alabama considered this period as substantive, the Fifth Circuit concluded that a Mississippi court would apply Alabama's shorter time period.[125]

Recently Mississippi forums attempted an alternate means of avoiding implementation of the forum's statutory period — *forum non*

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court concluded that Tennessee deemed its limitations period to be procedural. *Id.* Since Tennessee's statute was procedural only, the Mississippi court would apply forum law, including Mississippi's six-year statute. *Id.*

[118] *Id.* The right-remedy distinction was criticized severely by Justice Robertson in *White* as "nonsense", "well on its way to the junk heap of discarded legal fictions." *White*, 494 So. 2d at 579 (Robertson, J., concurring). Justice Robertson based his criticism on the fact that the theory is unrealistic, since a right with no "legally enforceable" remedy is not much of a right. *Id.* at 581, *quoting* GOODRICH, CONFLICTS OF LAWS § 85 at 152-53 (4th ed. 1964).

[119] 183 So. 2d 912 (Miss. 1966).

[120] *Id.* at 916. In so deciding, the Mississippi Supreme Court found *Louisville and N.R. Co. v. Dixon*, also concerning the Louisiana Compensation Law, determinative. *Id.*

[121] *See supra* notes 32, 33, 117 and accompanying text.

[122] *Davis*, 743 F.2d at 1134. In *Davis* the Fifth Circuit, interpreting Mississippi's conflicts of laws rules to a suit in which Colorado had the most substantial relationship, ruled that the Mississippi Supreme Court would apply Colorado's limitation period if Colorado courts deemed that period substantive. *Id.* Since Colorado courts construed the statute as emphasizing the remedy, in Barnhill v. Public Serv. Co., 649 P.2d 716, 719 (Col. Ct. App. 1982), then the limitation period was a matter of procedural law. *Davis*, 743 F.2d at 1134. Mississippi courts in that instance would apply forum law. *Id.*

[123] 784 F.2d 600 (5th Cir. 1986).

[124] *Id.* at 605. Since the suit was not filed until five years after the death of the appellants, the negligence and strict liability claims were time-barred under the Alabama statutory period. *Id.*

[125] *Id.* at 606. *But see White*, 494 So. 2d at 581 n.4 (Robertson, J., concurring) (criticizing *Price* for propagating right/remedy distinction).

conveniens.[126] In the initial hearing on *Shewbrooks*, the Mississippi Supreme Court affirmed the lower court's dismissal of the suit on the basis of *forum non conveniens.*[127] Justice Anderson's plurality opinion, however, was reversed on subsequent rehearing, eliminating this avenue of relief for Mississippi courts. In a strongly worded dissent, Justice Anderson argued that *forum non conveniens*, though innovative, was "neither unprecedented nor unsupported by sound reasons of policy."[128] This plea for an additional judicial alternative to the narrow construction of the borrowing statute, as well as the traditional treatment of statutes of limitation, fell on deaf ears.

V. Anomalous Results from Mississippi's Adoption of Traditional Treatment of Statutes of Limitation

Mississippi's longstanding "open door" policy[129] to foreign plaintiffs, in conjunction with the current body of conflicts laws and an unusually long "tort" statute of limitations[130] has created anomalous results in cases involving foreign parties and causes of action. The anomaly can be illustrated best with a hypothetical situation. Suppose a foreign plaintiff has a cause of action in tort against a corporation qualified to do business in Mississippi.[131] The cause of action has arisen in a foreign state whose statute has already run. All witnesses and all necessary discovery will be located in the foreign state. The plaintiff, however, may bring suit in Mississippi against the foreign corporation[132] due to the long statute of limitations period.[133] Since the foreign defendant was a "resident" of Mississippi when the cause of action arose, he may not use the borrowing statute.[134] The major decision will be whether to sue in federal court (diversity grounds being available) or state court. Since the *Shewbrooks* decision, a plaintiff must consider that in state court there will be no *forum non conveniens* dismissal.[135] Additionally, if the plaintiff is able to bring suit in federal court, the federal court would be bound to apply Mississippi conflicts law,[136] as well as its statute of limitations.[137] Should either plaintiff or defendant be successful in transferring to a more convenient forum,[138] the alternate federal court would be bound, under *Van Dusen v. Barrack*,[139] to apply Mississippi law.[140] While the substantive law of the foreign state might be used, following the "most substantial relationship" theory,[141] the statute of limitations applied will in all probability be that of Mississippi.[142] Suits will be heard in federal courts in the same state whose statute of limitations had previously barred the claim.[143]

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[126] *Shewbrooks*, 529 So. 2d at 574 (Anderson, J., dissenting).

[127] *Id.* In his dissent Justice Anderson indicated that the *Shewbrooks* case called for a *forum non conveniens* dismissal, a decision which should be left to the discretion of the trial judge. *Id.* (Anderson J., dissenting). In his majority opinion Justice Hawkins decried the use of a *forum non conveniens* dismissal, especially in a suit in which no other forum was available. *Id.* at 562 (Hawkins, J.). Citing § 84 of the Restatement, Conflict of Laws, Justice Hawkins argued that *forum non conveniens* should not be applied in the situation of a statute of limitations bar unless the defendant stipulated to waiving the limitations defense. *Id.* Federal courts in Mississippi have utilized such procedure, Justice Hawkins emphasized. *Id.* at 563, *citing* Tisdale v. Stone and Webster Corp., 595 F.Supp. 1016, 1020 (S.D. Miss. 1984). Countering the majority opinion, Justice Anderson maintained that a *forum non conveniens* dismissal required only that there be another forum in which the defendants were amenable to process. *Id.* at 576 (Anderson, J. dissenting).

[128] *Shewbrooks*, 529 So. 2d at 574 (Anderson, J., dissenting).

[129] *See Price*, 784 F.2d at 605 (Mississippi expresses open door policy to litigation involving foreign parties by adoption of its longer than usual statutes of limitations). In a line of cases following Pullman Palace Car Co. v. Lawrence, 74 Miss. 782, 22 So. 53 (1897), Mississippi has evidenced a policy of opening the doors of its courts if jurisdiction over the subject matter and the party could be obtained. *See* Comment, *A Constitutional Analysis of the Mississippi Commercial Code's Conflict of Laws Provision*, 53 Miss. L.J. 619, 627 (1983) (state courts asserted jurisdiction over defendants whose only connection was "doing business").

[130] Miss. Code Ann. § 15-1-49 (1972); *see supra* note 8. Only four other states have six year statute of limitations for personal injury claims: Maine (Me. Rev. State. Ann. tit. 14, § 752 (1964), Minnesota (Minn. Stat. § 541.05 (Supp. 1987); North Dakota (N.D. Cent. Code § 28-01-16 (1974)); and South Carolina (S. C. Code Ann. § 15-3-530 (Law Co-op. 1977).

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[131] MISS. CODE ANN. § 79-4-15.10 (Supp. 1987). The statute provides that corporations qualified to do business in Mississippi authorize a registered agent as the corporation's agent in the state for service of process. *Id.*

[132] *See Cowan*, 694 F.2d at 106 (corporations authorized to do business in Mississippi considered "equivalent to resident of state"), *citing* Leavell v. Doster, 211 So. 2d 813 (Miss. 1968).

[133] *See supra* notes 8 and 130.

[134] *See supra* note 108 and accompanying text.

[135] *See supra* notes 3-26 and accompanying text.

[136] Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 496 (1941). Following *Klaxon* district courts sitting in diversity jurisdiction are bound to apply the choice-of-law rule of the state in which the court sits. *Id.*

[137] *See Price*, 784 F.2d at 602 (federal district court in diversity action "bound to apply law of forum state, including conflict of laws rules"), citing *Klaxon*, 313 U.S. at 496 and Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938).

[138] 28 U.S.C. § 1404(a). Transfer may be made from one federal district court to another on the basis of convenience to the parties. *Id.*

[139] 376 U.S. 612 (1964).

[140] *Id.* at 640. Under *Van Dusen*, when in a diversity action a motion to transfer from one federal district court to another is made, the applicable law is that of the transferor state. *Id.* at 639. The *Van Dusen* court did not attempt to determine whether results would be different if the plaintiff moved to transfer. *Id.* Argument can be made, however, that if the plaintiff moves for a transfer, the law of the transferee state should apply. WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE, § 3846 (2nd ed. 1986). However, cases appear to employ transferor state's law regardless of whether venue and jurisdiction are proper. *Id.*

An example of the above scenario transpired in a Kansas courtroom. The Tenth Circuit in *Schreiber v. Allis-Chalmers Corp.*[144] faced the situation involving a Kansas plaintiff injured in Kansas by a product manufactured by a Delaware corporation with its principal place of business in Wisconsin.[145] Although the plaintiff sued in a Mississippi district court,[146] taking advantage of Mississippi's six year statute, the suit was transferred by the defendant to a federal district court in Kansas.[147] The Tenth Circuit, reversing the lower court,[148] held that while Kansas' substantive law controlled, Mississippi's statute of limitations would be used.[149]

Subsequent to this decision numerous commentators leveled criticism at what they considered constitutional violations inherent in the *Schreiber* decision.[150] Resulting from the criticism and perhaps due to the inability to refrain longer from some meaningful expression of the unfairness and ridiculousness of the *Schreiber* opinion, the Third Circuit, utilizing a due process argument, reached a contrary conclusion. In the 1987 case, *Ferens v. Deere and Co.*[151], a Pennsylvania plaintiff, injured in Pennsylvania by a product manufactured by a Delaware corporation with its principal place of business in Illinois, brought suit in a federal district court in Mississippi.[152] Personal jurisdiction was obtained since the defendant was qualified to do business in Mississippi.[153] Plaintiff subsequently transferred the suit to a district court in Pennsylvania.[154] While the Pennsylvania district court applied the substantive law of Pennsylvania (as would a Mississippi court following a determination of the state with most substantial contacts),[155] it utilized Pennsylvania's rather than Mississippi's statute of limitations.[156] The Third Circuit affirmed, reasoning that in situations in which the forum court had only insignificant contacts (in *Ferens* only nominal residence), application of the forum state's law would be "arbitrary, fundamentally unfair, and, therefore, unconstitutional."[157] The court noted that it was immaterial whether transfer was instigated by plaintiff or defendant.[158] Whether or not the Third Circuit's decision could with-

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[141] *See supra* notes 16 and 17 and accompanying text.

[142] *See supra* notes 20 and 22 and accompanying text.

[143] See Martin, *supra* note 7, at 414 (*Erie* argument that "accident" of federal diversity jurisdiction should not provide result different from that obtained in state court).

[144] 448 F. Supp. 1079 (D.Kan. 1978), *rev'd*, 611 F. 2d 790 (10th Cir. 1979).

[145] *Schreiber*, 611 F.2d at 791. The machine, a Roto-Baler, which injured Lawrence Schreiber by amputating both arms, was not manufactured in Mississippi. Although subsequent to 1973 Allis-Chalmers did own a Mississippi plant, manufacturing power breakers for utility companies, at the time the cause of action arose Allis-Chalmers' only business in Mississippi was related to sales and promotion. *Id.* at 793.

[146] *Schreiber*, 448 F. supp. at 1081. Schreiber sued in United States District Court, Southern District of Mississippi, on the theories of ordinary and gross negligence, breach of implied warranty and strict liability six days before Mississippi's statute had run. *Id.* The suit would have been barred in Kansas or Delaware. *Id.*

[147] *Id.* at 1081-82. Defendant's motion for transfer to a Kansas courtroom, which was initially denied, was achieved only after the Fifth Circuit issued a writ of mandamus. *Id.*

[148] *Id.* at 1100-01. The district court found that Mississippi lacked sufficient contacts to establish jurisdiction and that, alternatively, Mississippi would have applied Kansas' statute of limitations. *Id.*

[149] *Schreiber*, 611 F.2d at 794. Although sympathizing with the lower court, the Tenth Circuit ruled that the Kansas federal district court had a duty to follow the currently existing Mississippi law without anticipating a change in the next case. *Id.*

[150] *See* Martin, *supra* note 7, at 408, 415, 420-22 (heatedly critical of Tenth Circuit's decision as well as Mississippi's lengthy statute of limitations). Martin's criticism is based on his belief that application of Mississippi's statute where so few contacts exist violates the full faith and credit clause of the Constitution. *Id.* at 415. Additionally, Martin found "no rational procedural or substantive interest" for imposition of Mississippi's

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limitation period. *Id.* at 20. *See also* Grossman, *supra* note 24, at 56-64 (criticism of blatant forum-shopping).

[151] 819 F.2d 423 (3rd Cir. 1987).

[152] *Id.* at 424. Injured by a combine manufactured and distributed by Deere, Ferens filed initially in federal court in Pennsylvania and three weeks later in the federal court in Southern District of Mississippi, Jackson Division, on the theories of negligence and strict liability in tort. *Id.*

[153] *Id.*

[154] *Id.* Plaintiff in his motion to transfer reasoned that the claim had little connection to Mississippi, that the material witnesses resided in Pennsylvania, that certain documents were in Pennsylvania and that the breach of warranty action filed in Pennsylvania contained common questions of law and fact. *Id.* at 424-25.

[155] *See supra* notes 16 and 17 and accompanying text.

[156] *Ferens*, 819 F.2d at 425. The district court gave summary judgment to defendant Deere and Co., asserting Pennsylvania's statute of limitations barred the negligence and strict liability claims and that the terms in the warranty foreclosed the breach of warranty action. *Id.*

[157] *Id.* at 426-27. Noting the criticism of *Schreiber*, the Third Circuit analogized the case to that in Home Insurance Co. v. Dick, 281 U.S. 397 (1930) and Hartford Accident and Indemnity Co. v. Delta and Pine Land Co., 292 U.S. 143 (1934) which involved the insignificant contact of nominal residence. *Ferens*, 819 F.2d at 427. Quoting Justice Brennan in Allstate v. Hague, 494 U.S. 302, 310-11 (1981), the Third Circuit argued that nominal residence was insufficient. *Ferens*, 819 F.2d at 427. Therefore, the mere fact of Deere and Co.'s nominal residence in Mississippi would be inadequate to require even a Mississippi court to apply its own law. *Id.* at 427 n.5.

[158] *Ferens*, 819 F.2d at 426 n.4.

stand the Supreme Court's scrutiny,[159] the result does highlight the frustration and indignation felt by foreign jurisdictions with regard to the treatment of statutes of limitation in Mississippi.

VI. CRITICISMS OF MISSISSIPPI'S CONSTRUCTION OF STATUTES OF LIMITATIONS IN CONFLICTS ANALYSIS

With *Ferens v. Deere and Co.* as a barometer indicating the climate of opinion, the time has come for a change in Mississippi's position regarding statutes of limitations. Criticisms have been leveled at all aspects of Mississippi's choice of law for statutes of limitations from both domestic[160] and foreign sources.[161] The entire substance-procedure dichotomy has been decried as outworn and illogical.[162] What could be more substantive, critics claim, than having a cause of action fail by its being time barred?[163] Even Mississippi's judicial attempts to skirt the issue[164] and apply the limitation period of the foreign state appear to be mere manipulation and recognition of the disinclination of the judiciary to characterize statutes of limitations as procedural.

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[159] *Id.* at 428-29 (Seitz, Cir. J., dissenting). Although both *Hague* and *Dick* opinions relied on by the majority in *Ferens* concern only the constitutional limits on the forum's choice of *substantive*, rather than *procedural law*, the policy basis for the former would appear to extend to a forum's choice of procedure. The Third Circuit's concern with arbitrariness, with anomalous results of cases similar to *Schreiber*, and with the forum states' interest in barring stale claims bears further consideration. Justice Seitz, disagreeing and dissenting in *Ferens*, argued that since the traditional treatment of statutes of limitations was procedural and since the Supreme Court had declined at that point to decide whether a forum's traditional use of its own statute of limitations violated due process, *see* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 778 n.10 (1984), it would appear that the Third Circuit's opinion could not stand. *Ferens*, 819 F.2d at 428 (Seitz, Cir., J., dissenting). The dissent further disagreed with the majority's considerations of the plaintiff's motives as a basis for determining whether the transferor state's law could be utilized. *Id.* However, argument could be made, according to the dissent, that a plaintiff-initiated transfer should not be given the same consideration as one by a defendant, a question expressly left open in *Van Dusen*. *Id.* at 429 This issue, however, was one for Congress' consideration. *Id.*

[160] *See Shewbrooks*, 529 So. 2d at 573 (Robertson, J., dissenting) (course of court "jurisprudentially more sound" if employed center of gravity/choice of law rules to determine appropriate limitations period) and *White*, 494 So. 2d at 581-82 (Robertson, J., concurring) (arguing the fallacies of the right/remedy distinction and substance/procedure dichotomy).

[161] *See Ferens*, 819 F.2d at 425 (concerning "aberrational" aspects of Mississippi statute of limitations/conflicts rules); Grossman, *supra* note 24, at 64 (conclusion that Mississippi court can constitutionally apply forum law does not make it wise choice); Martin, *supra* note 7, at 415 (regarding Mississippi's conflicts rules as villain rather than § 1404(a)).

[162] *See supra* notes 70, 71, 76 and accompanying text.

[163] *See* LEFLAR, *supra* note 64, at 304 (historical treatment of limitations periods as procedural does not make much sense).

Mississippi's borrowing statute has not fulfilled the purpose of those statutes in general.[165] Little reason exists for the continued misinterpretation of the statute long followed by the judiciary. The needs of Mississippians and its courts have changed since the 1880's. With no long-arm jurisdiction and actions against multi-state corporations less frequent, litigation then was more local in scope. The mass tort claims currently being litigated were not within the contemplation of the legislature or courts of that day.[166] Modern courts and legislatures must be flexible enough to cope with current issues and concerns and be cognizant of the far-reaching results of the aggregation of Mississippi's conflicts laws. Citizens of Mississippi must not take a back-seat to nonresidents who are seeking resolution of claims time-barred in foreign states.[167] Industry must be encouraged to do business in Mississippi and not be scared away through fear of unexpected litigation.[168] Sparse Mississippi funds should not be expended on foreign parties and claims due to Mississippi's open door policy.[169] Why should Mississippi be the dumping ground, the only state out of step with the other forty-nine? Why should Mississippi be fiftieth in line on yet another issue?

Since the issue of statutes of limitations is a matter of immediate concern, Mississippi courts should look to the reasons for the development and continuance of the current system. Characterizing statutes of limitation as procedural has been lauded as being simpler and more predictable.[170] Yet is this a valid reason in view of the ease of determining a foreign state's limitation period?[171] Predictability is not as important when dealing with a tort action as it is with a contract action.

Does Mississippi continue its "open door" policy in order to further justice? Perhaps the legislature has failed to act because of additional business brought to both plaintiff and defense attorneys[172] and because legislators, many of whom are attorneys, are influenced by this result. If the interest is in furthering justice, providing a forum for stale claims really does not benefit either party.[173]

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[164] *See supra* notes 28-31 and accompanying text.

[165] *See supra* note 89-112 and accompanying text.

[166] *See* Brief for Appellees at 20, *Shewbrooks*, (No. 56,014) (almost two hundred asbestos claims filed by non-residents in United States District Court for Southern District of Mississippi).

[167] *Id.* at 25.

[168] *See Schreiber*, 448 F. Supp. at 1091 (corporation doing business nationwide would find itself "subject to suit everywhere . . . for claims unconnected with activities of forum").

[169] Brief for Appellees at 25, *Shewbrooks*, (No. 56,014).

[170] *See* Ailes, *supra* note 76, at 408 (substance-procedure distinction insures consistent and predictable results).

[171] *See supra* note 65 and accompanying text.

Perhaps Mississippi believes it has the "better law"[174] or perhaps this is another example of a parochial attitude.[175] The courts and legislature might want to retain traditional interpretations and characterizations merely because "it has always been treated this way." Whatever reasons exist for continuing the treatment of statutes of limitation as procedural, the implications for Mississippi's courts are so momentous that the Mississippi Supreme Court, as well as the legislature, should analyze fully all aspects of the situation.

Several avenues are available for resolution of the issue of statutes of limitations treatment. In 1982 the National Conference of Commissioners on Uniform State Laws approved the Uniform Conflict of Laws-Limitations Act,[176] adopted to date by four states.[177] The Uniform Act treats limitations periods as substantive, and indicates that the limitations period will be governed by the state law of that state whose substantive law governs.[178] There is an "escape clause", however.[179] If the forum state has a strong public policy, the forum may apply its own law to avoid harsh or unjust results.[180]

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[172] *See* Comment, *supra* note 129, at 634-35 (additional suits prove lucrative to local lawyers).

[173] The Clarion Ledger, January 17, 1988, section H at 1, col. 1 (reform of judiciary necessary to prevent stale claims).

[174] *See* Leflar, *supra* note 16, at 282 (five choice influencing considerations including the "better rule of law").

[175] *See* Vernon, *supra* note 25, at 316 (Mississippi's parochialism "out of place" in federal system).

[176] Uniform Conflict of Laws-Limitations Act, Preferatory Note, 12 U.L.A. 50,51 (Supp. 1987). The initial act, the Uniform Statute of Limitations on Foreign Claims Act, promulgated in 1957, was not well received probably due to its harsh consequences. *Id.* The Act provided that in determining which law applied between the forum and the state wherein the cause of action accrued, the choice would be the shorter of the two. *Id.*

[177] *Id.* The four states which have adopted the Uniform Limitations Act are Arkansas, Colorado, North Dakota and Washington. *Id.*

[178] *Id.* at 51 comment 2. The Uniform Act was designed to be compatible with any of the modern approaches to conflicts analysis. *Id.*

[179] *Id.* at 52 comment 4. The "escape" clause allows courts to do openly under the Act what it would do indirectly to avoid injustice. *Id.*

[180] *Id.* As a member of the committee that drafted the Limitations Act, Robert Leflar has endorsed its approach as promoting simplicity, predictability and uniformity. *See* Leflar, *supra* note 47, at 488-89 (drafting committee agreed that each state's con-

An alternate and preferable avenue would be to adopt the position taken by the proposed revisions of the *Restatement (Second) of Conflicts of Laws.*[181] The analysis in that instance would be identical to one already being applied by Mississippi courts in choosing the substantive law in a conflicts situation.[182] Statutes of limitation would be deemed substantive and the limitation period of the state with the "most significant relationship" would be applied.[183] Actually, for Mississippians the choice of either the Uniform Act or the *Restatement (Second)* position leads to the same result — the "most significant relationship" test.[184] Therefore, the only decision falls to a choice between legislative enactment or judicial interpretation. The choice is relatively simple for two reasons. Primarily, adoption of the *Restatement (Second)* approach is appropriate because historically, in Mississippi and elsewhere, selection of the entire body of conflicts laws is based upon judicial interpretation.[185] Therefore, the decision of whether statutes of limitations are substantive or procedural is the proper domain of the Mississippi Supreme Court. Secondly, politically potent issues, such as tort and judicial reform, have made little headway in the past with the Mississippi Legislature, as exemplified by the 1988 Regular Session.[186] In 1988, the only portions of the Tort Reform Bill voted out of committee concerned amending the borrowing statute, the general statute of limitations and the limitations period for breach of contract for sale.[187] The legislature's lack of interest in tort reform was reemphasized since the amendment to section 15-1-65 never came to a vote on the House floor and the amendment to the general statute died before being presented to a conference committee.[188]

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flicts of laws rules should govern limitations problems).

[181] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 (Revisions 1986). *See supra* notes 53-55 and accompanying text.

[182] *See supra* notes 16, 17 and accompanying text.

[183] *See supra* notes 53-55 and accompanying text.

[184] *See supra* notes 53-55 and accompanying text.

[185] *See supra* notes 16, 17, 23, 41-44, 60-63 and accompanying text. Additionally, the Mississippi Supreme Court has recently proclaimed its reliance on the RESTATEMENT (SECOND) OF CONFLICT OF LAWS:

> In recent years we have relied heavily on the Restatement of Conflicts of Laws in deciding choice of law questions coming before this court.

Kountaris v. Varvaris, 476 So. 2d 599, 606 (Miss. 1985).

[186] House Calendar, Reg. Sess. 1988 Miss. (March 16, 1988).

[187] *See supra* notes 8 and 23.

[188] *Id.*

VII. CONCLUSION

With criticism abounding and foreign plaintiffs seeking jurisdiction, the Mississippi Supreme Court no longer should refrain from addressing the issue. The time has come for Mississippi to abandon its traditional treatment of statutes of limitation as procedural. Since Mississippi has already adopted the *Restatement (Second)* approach for substantive law, it should complete the process by adopting the same approach for statutes of limitations.[189] The adoption of such modern conflict principles would fulfill the general purposes of conflicts rules, such as predictibility, simplicity and uniformity.[190] In addition, the Mississippi Supreme Court should reassess its interpretation of the borrowing statute which currently is applicable to a narrow and limited class.[191] With the continuation of claims similar to the Shewbrooks being filed daily in Mississippi courts and the prospect of additional mass tort litigation in other products liability "toxic tort" areas, it is imperative that the Mississippi Supreme Court view this issue as a matter of the utmost public interest and take prompt action to avoid Mississippi's continued characterization as a "dumping ground" for "homeless tort litigation."[192]

Dinetia M. Newman

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[189] *See* Grossman, *supra* note 24, at 64-65 (encouraging modern analysis as enabling court's intelligent, reasoned choice of law).

[190] RESTATEMENT (SECOND) OF CONFLICT OF LAW § 6 (1971).

[191] *See supra* notes 93-108.

[192] *Shewbrooks*, 529 So. 2d at 574 (Anderson, J., dissenting).

RULE 11 IN THE FIFTH CIRCUIT AFTER *THOMAS v. CAPITAL SECURITY SERVICES, INC.*

> "The proper application of Rule 11 is so unclear that almost half the judges in the survey would have sanctioned as frivolous the same paper that the other half of the responding judges thought did not violate the rule."[1]

In 1983, Rule 11 of the Federal Rules of Civil Procedure was amended[2] in an effort to check "abusive tactics and help streamline the litigation process by lessening frivolous claims or defenses."[3] Ironically, the amendment seems to have had just the opposite impact with respect to decreasing the amount of litigation. Since its amendment, there have been nearly 700 reported Rule 11 decisions[4] and no way to quantify the number of unreported decisions. In over half of these cases, violations were found or a warning was given.[5]

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[1] Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 Harv. L. Rev. 630, 641 (1987)(citing results from survey conducted in 1985 by Federal Judicial Center).

[2] The Rule as amended reads as follows (with stricken matter in brackets, new matter in italics):

> Every pleading, *motion, and other paper* of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, *motion, or other paper* and state the party's address. Except when otherwise specifically provided by rule or statute, the party's pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney *or party* constitutes a certificate by the signer that the signer has read the pleading, *motion, or other paper*; that to the best of the signer's knowledge, information, and belief [there is good ground to support it, and that it is not interposed for delay] *formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.* If a pleading, *motion, or other paper* is not signed, *it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.* [or if signed with intent to defeat the purpose of this rule, it may stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this Rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.] *If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.*

I Moore's Rules Pamphlet with Comments § 11.2 [2], at 110 (1986).

The Fifth Circuit is responsible for just over thirteen percent of reported Rule 11 circuit court decisions.[6] A review indicates that the various panels have experienced difficulty in determining just how to apply the rule, thereby leading to inconsistent results.[7] The Fifth Circuit recognized this problem and ordered a rehearing *en banc* in the case of *Thomas v. Capital Security Services, Inc.*,[8] in an effort to "ameliorate this confusion and modify existing inequities to the extent possible . . . ."[9] To achieve this goal, the *Thomas* court set out several important issues and attempted to clarify exactly how these were to be applied, addressed, and/or evaluated in the circuit.[10]

This article will discuss how each of the various matters decided by the *Thomas* court had previously been dealt with in the circuit and, also, how other circuits are holding with respect to these issues. An analysis of each of the court's holdings will be included and will focus on the impact of these holdings on future Rule 11 cases in the Fifth Circuit. Finally, there will be a brief discussion on how the *Thomas* decision will impact the so-called "chilling effect" of Rule 11.

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[3] FED. R. CIV. P. 11, (Advisory Committee Notes); *see* Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1020 (1988)("[t]he proper role of Rule 11 . . . is to deter litigation abuse.").

[4] Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 199 (1988). Between August 1, 1983, when the amended Rule took effect, and December 15, 1987, there have been 688 reported Rule 11 decisions. *Id.* Of these decisions, 496 are district court opinions and 192 are circuit court opinions. *Id.* Research conducted for the writing of this article reveals that the number of reported decisions is now well over the 700 mark.

[5] *Id.* In 680 of the cases in which sanctions were requested, a violation was found or warning given in 57.8%. *Id.*

[6] *Id.* App. at 238. Of the 192 circuit court opinions, the Fifth Circuit has written 26. *Id.* The district courts within the circuit have published 50 opinions. *Id.*

[7] *See infra* notes 30-33 and accompanying text, and notes 44-48 and accompanying text.

[8] 836 F.2d 866 (5th Cir. 1988).

[9] *Id.* at 871. The plaintiffs filed a class action which they later failed to certify and also made, what the district court deemed, "shotgun" allegations. *Id.* at 868-69.

[10] *Id.* at 871-83. These issues included such things as the appropriate standard of review, the obligation of an attorney under the Rule, and whether or not there is a duty to mitigate. *Id.* at 871-81.

I. The Appropriate Standard of Review

The *Thomas* court recognized both that clarification and determination of the appropriate standard of review to be utilized when "assessing a district court's ruling on Rule 11 sanctions" were necessary.[11] A standard of review prescribes the degree of deference that the court of review will give to the actions and decisions of the lower court in determining whether the lower court's decision was incorrect, and whether that decision contains a reversible error.[12] To say that the standard of review applied by the circuits in Rule 11 cases has been inconsistent would be a gross understatement. These inconsistencies may be directly related to the fact that Rule 11 sets out no specific standard of review to be applied in such cases.[13]

In *Nelson v. Piedmont Aviation, Inc.*,[14] one of the first reported Rule 11 cases, the Fourth Circuit applied an abuse of discretion standard and upheld the district court's denial of sanctions.[15] Since its decision in *Nelson*, the circuit has consistently applied the abuse of discretion standard in Rule 11 cases.[16] Other circuits have followed the

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[11] *Thomas*, 836 F.2d at 871.

[12] 1 S. Childress & M. Davis, Standards of Review § 1.1, at 4 (1986).

[13] The Advisory Committee Notes do state that the district courts have "discretion to tailor sanctions to the particular facts of the case, with which it should be well acquainted." Fed. R. Civ. P. 11 Advisory Committee Notes; *see also Thomas*, 836 F.2d at 871 (citing Advisory Committee Notes and noting that Rule 11 sets forth no specific standard of review).

[14] 750 F.2d 1234 (4th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985).

[15] *Id.* at 1238. In *Nelson*, the plaintiff alleged violation of the Railway Labor Act. The trial court found that the Act was not applicable to that plaintiff. *Id.* at 1235. The court, however, refused to impose sanctions, finding that the analogies were not drawn in bad faith. *Id.* at 1236.

[16] *See* LaVay Corp. v. Dominion Fed. Sav. & Loan Ass'n., 830 F.2d 522, 528 (4th Cir. 1987)(vacating and remanding district court's denial of Rule 11 sanctions since it developed no record on that issue); Langham-Hill Petroleum, Inc. v. Southern Fuels Co., 813 F.2d 1327, 1331 (4th Cir. 1987)(district court did not abuse its discretion in awarding attorney's fees under Rule 11); Cleveland Demolition Co., Inc. v. Azcon Scrap Corp., 827 F.2d 984, 987 (4th Cir. 1986)(district court acted within its discretion in imposing Rule 11 sanctions), *cert. denied*, 108 S.Ct. 99 (1987); Dalton v. United States, 800 F.2d 1316, 1320 (4th Cir. 1986)(district court properly exercised its discretion in imposing sanctions on taxpayer's attorney), *cert. denied*, 107 S.Ct. 911 (1987); Stevens v. Lawyers Mut. Liab. Ins. Co., 789 F.2d 1056, 1060-61 (4th Cir. 1986)(district court's imposition of Rule 11 sanctions against plaintiff's attorney, in form of published reprimand, must be reversed as abuse of discretion; however, no abuse of discretion in district court's denial of plaintiff's motion for sanctions against defendant for filing Rule 11 motion); Cohen v. Virginia Elec. & Power Co., 788 F.2d 247, 248-49 (4th Cir. 1986)(district court did not abuse its discretion in awarding attorney's fees and costs pursuant to Rule 11); LaRouche v. Nat'l Broadcasting Co., 780 F.2d 1134, 1140 (4th Cir. 1986)(no abuse of

Fourth Circuit and applied the abuse of discretion standard.[17] The Ninth Circuit developed a three-tier analysis in the case of *Zaldivar v. City of Los Angeles*,[18] which consisted of a clearly erroneous, *de novo* and abuse of discretion standard of review. This three-tier analysis has been followed both in part and in full in numerous decisions of that court.[19] The Seventh Circuit has adopted this analysis as the proper

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discretion in district court's denial of Rule 11 motion), *cert. denied*, 107 S.Ct. 79 (1987); Basch v. Westinghouse Elec. Corp., 777 F.2d 165, 174 (4th Cir. 1985)(appellate court could not conclude that district court judge abused his discretion in imposing sanctions) *cert. denied*, 106 S.Ct. 1975 (1986); Chu v. Griffith, 771 F.2d 79, 81 (4th Cir. 1985)(same); *see also* Note, *Rule 11 Sanctions: Contrasting Applications in the Second and Fourth Circuits*, 46 MD. L.J. 470, 475-77 (1987)(discusses standard of review in Fourth Circuit cases).

[17] *See* Fudge v. Penthouse Int'l, Ltd., 840 F.2d 1012, 1022 (1st Cir. 1988)(district court's Rule 11 decision is reviewed only for abuse of discretion); Snow Machines, Inc. v. Hedco, Inc., 838 F.2d 718, 724 (3rd Cir. 1988)(question is whether district court abused its discretion); Burull v. First Nat'l Bank, 831 F.2d 788, 790 (8th Cir. 1987)(applying abuse of discretion standard of review); Cotner v. Hopkins, 795 F.2d 900, 903 (10th Cir. 1986)(same).

[18] 780 F.2d 823, 828 (9th Cir. 1986). In *Zaldivar*, plaintiffs alleged violations of the Voting Rights Act. *Id.* at 825. Intervenors prevailed on their motion for summary judgment, and Rule 11 sanctions were imposed on the plaintiffs. *Id.* at 826-27. The court felt that imposition would require numerous inquiries, and, therefore, developed the following analysis:

> If the facts relied upon by the district court to establish a violation of the Rule are disputed on appeal, we review the factual determinations of the district court under a clearly erroneous standard. If the legal conclusion of the district court that the facts constitute a violation of the Rule is disputed, we review that legal conclusion *de novo*. Finally, if the appropriateness of the sanction imposed is challenged, we review the sanction under an abuse of discretion standard.

Id. at 827.

Although the *Zaldivar* court developed its three-tier analysis to be applied when sanctions were being *imposed*, courts have nonetheless utilized the standard when reviewing the denial of sanctions; *see e.g.* Greenberg v. Sala, 822 F.2d 882, 885 (9th Cir. 1987)(citing *Zaldivar* as proper standard in review of denial of Rule 11 sanctions).

[19] *See* Lemos v. Feancl, 828 F.2d 616, 618 (9th Cir. 1987)(applying second tier *de novo* standard to determine whether specific conduct violated Rule 11); Hudson v. Moore Business Forms, Inc., 827 F.2d 450, 452-53 (9th Cir. 1987)(citing *Zaldivar* and applying three-tier analysis); Hurd v. Ralphs Grocery Co., 824 F.2d 806, 808, 811 (9th Cir. 1987)(applying second-tier *de novo* standard and determining that attorney's conduct did not violate Rule 11); Greenberg v. Sala, 822 F.2d 882, 885 (9th Cir. 1987)(applying first and second tiers of *Zaldivar* analysis); Wasyl, Inc. v. First Boston Corp., 813 F.2d 1579, 1581 (9th Cir. 1987)(applying second-tier *de novo* standard of *Zaldivar* because denial of sanctions was based upon legal conclusion); Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1538 (9th Cir. 1986)(applying three-tier analysis as proper standard of review).

standard of review.[20] In *Eastway Construction Corp. v. City of New York*,[21] the Second Circuit applied a two-tier analysis consisting of *de novo* and abuse of discretion standards.[22] The Eleventh and D.C. Circuits have adopted either the standard established in *Eastway* or a variation thereof.[23] The mandatory language of Rule 11[24] explains why courts have found it necessary to broaden the scope of review and impose a *de novo* standard.[25] In turn, this broadening of the standard of review is one of the reasons for the inconsistent application of a standard of review among the circuits.

The Fifth Circuit has not been immune from these inconsistencies as evidenced by numerous decisions in which it has applied different standards of review.[26] In the case of *Warren v. Reserve Fund, Inc.*,[27] decided less than one year after the amendment to Rule 11,[28] the court hinted that abuse of discretion would probably be the applicable standard in Rule 11 cases.[29] This standard was later specifically adopted and followed.[30] However, in early 1987, a panel[31] adopted the three-tier analysis established by the Ninth Circuit.[32] This three-tier analysis was applied in the instant case prior to rehearing *en banc*.[33] Upon rehearing, the court recognized these inconsistencies and specifically held that "an abuse of discretion standard across-the-board to *all* issues in Rule 11 cases is the better approach."[34]

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[20] *See* Brown v. Fed'n of State Medical Bds., 830 F.2d 1429, 1434 (7th Cir. 1987)(utilizing three-tier analysis as proper standard of review).

[21] 762 F.2d 243 (2d Cir. 1985), *cert. denied*, 108 S. Ct. 269 (1987).

[22] *Id.* at 254 n.7. The *Eastway* court developed a *de novo* standard of review to determine whether a pleading was groundless and an abuse of discretion standard when reviewing the specifics of the sanction awarded. *Id.* In *Eastway*, a contractor lost its case in state court and filed another case in federal court based on the same facts. *Id.* at 245-46.

[23] *See, e.g.*, Donaldson v. Clark, 819 F.2d 1551, 1556 (11th Cir. 1987)(en banc)(applying standard of review similar to that espoused by *Eastway* court); Westmoreland v. CBS, Inc., 770 F.2d 1168, 1174-75 (D.C. Cir. 1985)(same).

[24] Fed. R. Civ. P. 11 states, in pertinent part, that : "[I]f a pleading, motion or other paper is signed in violation of this rule, the court,. . . shall impose an appropriate sanction." *See infra* note 65.

[25] *See Eastway*, 762 F.2d at 254 n.7. (drafts of Rule clearly intended it to be directive, as evidenced by use of the word "shall"). *But see* Schwarzer *Sanctions Under the New Federal Rule 11 — A Closer Look*, 104 F.R.D. 181 (1985). In this article, Judge Schwarzer states "It is not likely that courts will consider themselves bound by the rule's mandatory language to impose sanctions. That the problems giving rise to the rule may be urgent does not diminish the critical role of discretion in the exercise of judicial power under the rule." *Id.* at 200.

[26] *See infra* notes 27-33.

[27] 728 F.2d 741 (5th Cir. 1984).

[28] Rule 11 as amended in 1983 took effect on August 1, 1983; the *Warren* case was decided on April 2, 1984. *Warren*, 728 F.2d at 741.

[29] *Warren*, 728 F.2d at 748. In determining whether to award attorney's fees based on Fed. R. Civ. P. 11 and 28 U.S.C. § 1927 (which allows the district court to impose attorney's fees on an attorney who unreasonably complicates legal proceedings), the court stated that the grant or denial of attorney's fees lies within the district court's discretion and will only be reversed on a showing of abuse of discretion. *Id.* The court found that the attorney's conduct in *Warren* did not reach that level of impropriety at

Although the *Thomas* court had good intentions[35] when it developed the across-the-board abuse of discretion standard, one must question how it can be properly applied. It is obvious that an abuse of discretion standard is appropriate when reviewing the district court's conclusion that the facts constitute a violation of the rule or the type of sanction imposed. However, to review the factual determinations made by a district court under such a standard does not seem logical. For example, a district court judge finds that an attorney has totally failed to investigate the facts of a case and concludes that a violation has occurred and imposes sanctions. Her conclusion and the sanction imposed can be reviewed under an abuse of discretion standard. However, it is mysterious how her factual findings, that the attorney did not investigate the facts, can be reviewed under such a standard. Rule 52 of the Federal Rules of Civil Procedure provides, in pertinent part, that findings of fact by the district court shall be reviewed under a

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which the district court's denial of fees would constitute an abuse of discretion. *Warren*, 728 F.2d at 748 and n.18.

[30] *See* Southern Leasing Partners, Ltd. v. McMullan, 801 F.2d 783, 787-88 (5th Cir. 1986)(applying abuse of discretion as proper standard of review); Davis v. Veslan Enterprises, 765 F.2d 494, 498 (5th Cir. 1985)(abuse of discretion standard used to determine whether district court erred in imposing sanctions).

[31] The panel consisted of Fifth Circuit Judges Gee and Hill and District Court Judge Hunter, sitting by designation. Robinson v. Nat'l Cash Register Co., 808 F.2d 1119, 1120 (5th Cir. 1987).

[32] *See Robinson*, 808 F.2d at 1126. The court noted that the third tier concerning abuse of discretion was not inconsistent with the standard set out in *Davis*, but that this standard merely builds upon the one in *Davis* and makes clear that the Fifth Circuit is consistent with several other circuits in its use of the abuse of discretion standard. *Robinson*, 808 F.2d at 1126 n.12.

[33] Thomas v. Capital Sec. Servs., Inc., 812 F.2d 984, 989 (5th Cir. 1987). In the case of Zhivangi v. Dean Witter Reynolds, Inc., 825 F.2d 885, 891 (5th Cir. 1987), the court criticized the three-tiered analysis as "more intrusive" than the abuse of discretion standard.

[34] *Thomas*, 836 F.2d at 872. The court felt that such a standard was necessary since the trial judge is in the best position to review all aspects of the case with which he is "intimately involved." *Id.* at 873.

[35] The court intended to simplify all aspects of the Rule and, therefore, must have felt that one standard of review would help fulfill this simplification. *Id.*

"clearly erroneous" standard.[36] The across-the-board abuse of discretion standard adopted in *Thomas* is, therefore, in direct conflict with Rule 52. A combination of the clearly erroneous and abuse of discretion standards may properly rectify the conflict which the *Thomas* opinion has created.

Because the district court judge is in the best position to make decisions and findings concerning the cases in her court, the abuse of discretion standard is preferable to any standard which contains a *de novo* type review. Any *de novo* review by the appellate courts will involve a repetitious review of case records. Therefore, such a review is unwarranted unless there is evidence that the trial judge in some way abused her discretion. Although appellate courts inherently possess the power, a truly *de novo* review could result in the court retrying the case on certain issues, which is unwise when a retrial would be based solely on the record and a brief oral argument.

The across-the-board abuse of discretion standard adopted in *Thomas* gives the district court judge's decision a deserved deference. It also satisfies some of the intentions of the drafters of the amendment.[37] However, to apply such a standard to a district court's findings of fact seems both illogical and unworkable. Nothing less than a two-tier analysis can be utilized in such cases. Such an analysis would review the district court's factual findings under a clearly erroneous standard and all other aspects under the abuse of discretion standard. Finally, the abandonment of any *de novo* review in these cases was both appropriate and in line with the drafters' intentions.[38]

II. Obligation of Attorneys Under Rule 11

Prior to the 1983 Amendment, the language of Rule 11 spoke in subjective terms.[39] However, the rule as amended now reflects a more stringent objective standard of reasonableness.[40] By signing a pleading, motion or other paper, an attorney certifies that he has complied with certain duties including that he has read the paper, that it is well grounded in fact and warranted by law, and that it is not brought for an improper purpose.[41] The Second Circuit was one of the first courts to impose the objective standard in cases where attorneys were alleged to have violated these affirmative duties.[42] Other circuits have also adopted this standard.[43]

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[36] Fed. R. Civ. P. 52.

[37] *See supra* note 13.

[38] A *de novo* review could result in separate proceedings and possibly involve discovery. The drafters of the amendment felt that discovery should only be conducted in "extraordinary circumstances." Fed. R. Civ. P. 11 Advisory Committee Notes.

[39] *See* Nemeroff v. Abelson, 620 F.2d 339, 347 (2d Cir. 1980)(reversing district court's award of attorney's fees since record showed case was not commenced in bad faith). The old bad faith formula is further evidenced by the language in the pre-1983 Rule 11 which required wilfulness on the part of an attorney in order for there to be a violation of the Rule and for the attorney to be subjected to disciplinary action. Fed. R. Civ. P. 11, Advisory Committee Notes; *see also*, *supra* note 2, deleted material in brackets.

The Fifth Circuit agreed.[44] However, in 1985, a district court within the circuit developed a standard which imposed a "continuing obligation" upon a certifying attorney to review and reevaluate his overall case.[45] The circuit subsequently picked up on this "continuing obligation" language and applied it in a limited fashion.[46] Finally, in the case of *Robinson v. National Cash Register Co.*,[47] the circuit specifically held that a certifying attorney had a continuing obligation to re-examine.[48] Other circuits have confronted and criticized this "continuing obligation" standard.[49] However, it was applied in the instant case prior to rehearing *en banc*.[50]

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[40] The Rule provides, in pertinent part, that the signature of an attorney certifies that he has

> [R]ead the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after *reasonable* inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

FED. R. CIV. P. 11 (emphasis added); *see also* Vairo, *supra* note 4 at 205-07 (author's comparison of objective and subjective standards).

[41] *See supra* note 40. The court in the instant case set out the affirmative duties to which an attorney certifies that he has complied by signing. These duties reflect those set out in the text of Rule 11: that the document is well grounded in fact and in law and is not presented for purposes of delay or harassment. *Thomas*, 836 F.2d at 874.

[42] *See* Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 253-54 (2d Cir. 1985). In *Eastway*, the court cited the affirmative duties imposed by Rule 11 and specifically held that the Rule "imposes an affirmative duty on each attorney to conduct a reasonable inquiry into the viability of a pleading before it is signed." *Id.* at 523.

[43] *See, e.g.*, LaVay Corp. v. Dominion Fed. Sav. & Loan Ass'n, 522, 528 (4th Cir. 1987)(applying objective standard and requiring plaintiffs to demonstrate some reasonable basis for their filings); Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531, 1538 (9th Cir. 1986)("if, judged by an objective standard, a reasonable basis for the position exists in both law and in fact . . . then sanctions should not be imposed."); Cotner v. Hopkins, 795 F.2d 900, 903 (10th Cir. 1986)(stating that under new rule, attorney must make reasonable inquiry).

[44] *See* Davis v. Veslan Enterprises, 765 F.2d 494, 500 (5th Cir. 1985)(reviewing conduct of attorney under reasonableness standard).

[45] *See* Woodfork v. Gavin, 105 F.R.D. 100, 104 (N.D. Miss. 1985)(stating that court "believed" that Rule obligated attorney to "continually" reevaluate his position as facts came to light). *But see* Johnson v. Veterans Admin., 107 F.R.D. 626, 628 (N.D. Miss. 1985)(court imposed sanctions and discussed objective standard but made no mention of any "continuing obligation").

[46] *See* Southern Leasing Partners, Ltd. v. McMullan, 801 F.2d 783, 788 (5th Cir.

Upon rehearing, the court analyzed the evolution of the "continu-

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1986)(stating that "counsel neglected its continuing obligation to review, reexamine and reevaluate its position . . .").

[47] 808 F.2d 1119 (5th Cir. 1987).

[48] *Robinson*, 808 F.2d at 1127. *Robinson* involved two suits, one in federal court which was lost by the plaintiffs and one began in state court and removed to federal court. *Id.* at 1121. Each suit was begun by the same plaintiffs against the same defendants based on the same claims. *Id.* The district court in the second suit applied the principle of res judicata which barred the suit and awarded the defendants attorney's fees pursuant to Rule 11. *Id.* On appeal to the Fifth Circuit, the court first held that an attorney's duty to make a proper inquiry into the law was tested by an objective reasonableness standard. *Id.* at 1127. The court then proceeded to develop the following affirmative duty to be imposed upon counsel:

> [A]ttorneys must realize that the inquiry required by rule 11 is not a one time only obligation. Counsel have a continuing obligation to review and reevaluate their position as the case develops . . . . Thus, a document that initially satisfies the requirement of rule 11 may later turn out to be the basis for rule 11 sanctions as new facts are discovered which show that there is no longer a good faith basis for the document. Upon discovering that a good faith basis no longer exists, it is incumbent upon the appropriate counsel and party to take necessary actions to ensure that the proceedings do not continue without a reasonable basis in law and fact.

Id. (citations omitted).

[49] *See, e.g.*, Hamer v. County of Lake, 819 F.2d 1362, 1370 n. 15 (7th Cir. 1987)(specifically noting that Rule 11 imposes no continuing obligation); Pantry Queen Foods, Inc. v. Lifshultz Fast Freight, 809 F.2d 452, 454 (7th Cir. 1987)(no updating of papers required if not subject to sanctions when filed); Oliveri v. Thompson, 803 F.2d 1265, 1272-74 (2d Cir. 1986)(contrasting Rule 11, which imposes no continuing obligation, with 28 U.S.C. § 1927, which imposes continuing prohibition against dilatory litigation). *But see* Golemi v. Creative Food Design, Ltd., 116 F.R.D. 73, 77 (D.D.C. 1987)(imposing upon counsel continuing obligation to reevaluate his litigation position); Sherman Treaters, Ltd. v. Aglbrandt, 115 F.R.D. 519, 524 (D.D.C. 1987)(same). One commentator stated that the continuing duty may be proper because it requires the parties to use information gained in the discovery process to reevaluate the issues and to discourage the use of litigation to coerce settlement. Nelken, *Sanctions Under Amended Rule 11 - Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 Geo. L.J. 1313, 1331 (1986); *see also* Peeples, *Litigant Responsibility: Federal Rule of Civil Procedure 11 and Its Application*, 27 B.C.L. Rev. 385, 398 (1986)(stating that "current" rule imposes continuing obligation).

[50] *Thomas*, 812 F.2d at 988. It should also be noted that the court stated that compliance with Rule 11 was measured by an objective standard of attorney performance. *Id.*

ing obligation" standard[51] and focused on the treatment by other circuits, as well as their reaction to the standard.[52] It was then abandoned in favor of an objective standard limited to evaluating an attorney's conduct *at the time of signing* a pleading, motion or other paper.[53] The court felt that such a conclusion was in accord with the intent of the drafters of the amendment to Rule 11.[54]

Commentators have stated that it is not necessary for a court to apply a subjective standard to determine if a violation under Rule 11 has occurred.[55] One of the main concerns of the drafters of the 1983 Rule 11 amendment was avoidance of any satellite litigation.[56] To impose a "continuing obligation" upon an attorney to reexamine would lead directly to such litigation, since the district court judge would have to initiate a separate proceeding to determine whether or not an attorney has complied with the obligation. Such proceedings could possibly involve the need for testimony or even discovery. The abandonment of this "continuing obligation" standard by the *Thomas* court and the adoption of a strict objective reasonableness standard to evaluate an attorney's conduct at the time he signs a pleading is in accord with both the spirit of Rule 11 and the drafters' intent.

Many commentators have been concerned with the reasonableness of the inquiry that must be made by an attorney into the facts and/or law of a particular case to protect himself under this stringent, yet vague, standard imposed on them by Rule 11.[57] In *Thomas*, the court was not overly concerned with this inquiry aspect of Rule 11. However, it did set out a number of factors for district courts to consider when evaluating the reasonableness of the inquiry made by an attorney at the time he signs a pleading, motion or other paper.[58] Although not exclusive, the factors cited by the *Thomas* court serve as excellent guidelines for members of the litigation bar in evaluating whether their inquiry into the facts and/or law is sufficient before they sign any paper.

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[51] *Thomas*, 836 F.2d at 874 n.9.

[52] *Id.* at 874 n.10. *See supra* note 49.

[53] *Id.*

[54] *Id.* at 874-75. The court noted that the Advisory Committee's Notes specifically provided that the court is expected to avoid using hindsight and should test the signer's conduct at the time the document was submitted. *Id.* at 875.

[55] Judge Schwarzer stated in his article on Rule 11 that "[w]hether sanctions are needed to remedy or to deter, and how severe they need to be, should be determined on the basis of the record before the court." Schwarzer, *supra* note 25, at 184.

[56] The Advisory Committee Notes to Rule 11 indicate that one of the purposes of the 1983 amendment was to "streamline the litigation process. . . ." FED. R. CIV. P. 11 Advisory Committee's Notes. In the same notes, the committee also states that "[t]o assure that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation over the imposition of sanctions, the court must to the extent possible limit the scope of sanction proceedings to the record." *Id.*

[57] *See* Vairo, *supra* note 4 at 205-20; Note, *Rule 11 Sanctions: Toward Judicial Restraint*, 26 WASHBURN L.J. 337, 355-65 (1987)(exact standard for "reasonable inquiry" has not been delineated); Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, *supra* note 1 at 642-44; Nelken, *supra* note 49 at 1329-33.

III. MANDATORY APPLICATION OF SANCTIONS

In the case of *Bell v. Bell*,[59] the Fifth Circuit affirmed a district court holding in which the judge found that the appropriate sanction for a Rule 11 violation was no sanction at all.[60] After *Bell*, the circuit began to follow Rule 11 in a more literal sense and in *Robinson v. National Cash Register Co.*,[61] a panel held that if a violation occurs, then the district court must impose an appropriate sanction.[62] In *Thomas*, the court adopted the *Robinson* rule and stated that attorneys who violated the rule would no longer enjoy any "free passes."[63] Other circuits had already adopted this rule of mandatory sanctions.[64]

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[58] The court stated that a district court could consider such factors as:

> [T]he time available to the signer for investigation; the extent of the attorney's reliance upon his client for the factual support for the document; the feasibility of a prefiling investigation; whether the signing attorney accepted the case from another member of the bar or forwarding attorney; the complexity of the factual and legal issues; and the extent to which development of the factual circumstances underlying the claim requires discovery. As to the determination of whether a reasonable inquiry into the law has been made, a district court may consider the time available to the attorney to prepare the document; the plausibility of the legal view contained in the document; the pro se status of a litigant; and the complexity of the legal and factual issues raised.

Thomas, 836 F.2d at 875-76.

[59] Slip op. at 2179 (5th Cir., Sept. 17, 1986).

[60] *Id.* at 2178.

[61] 808 F.2d 1119 (5th Cir. 1987).

[62] *Id.* at 1130-31. The court noted that by the use of the word "shall" the drafters intended to stress the mandatory imposition of sanctions for Rule 11 violations. *Id.* The court also acknowledged that sanctions should not be lightly imposed because of the effect on the attorney's and the party's reputations. *Id.* at 1131.

[63] *Thomas*, 836 F.2d at 876.

[64] *See, e.g.*, LaVay v. Dominion Fed. Sav. & Loan Ass'n, 830 F.2d 522, 528 (4th Cir. 1987)(court requiring imposition of sanctions for violation of Rule 11 if no reasonable basis for action found); Huettig & Schromm, Inc. v. Landscape Contractors Council, 790 F.2d 1421, 1426 (9th Cir. 1986)(sanctions are mandatory if Rule 11 has been violated); Albright v. Upjohn Co., 788 F.2d 1217, 1222 (6th Cir. 1986)(same); Westmoreland v. CBS, Inc., 770 F.2d 1168, 1175 (D.C. Cir. 1985)(amended Rule 11 mandates imposition of sanctions when warranted); Eastway Constr. Corp. v. City of New York, 762 F.2d 243,

The explicit language of amended Rule 11 clearly illustrates that the drafters intended for sanctions to be mandatory when a violation occurred.[65] The incorporation of the mandatory language was necessary if the rule was to have any effect in deterring abuses. The infrequent use of Rule 11 prior to its amendment demonstrates just how useless the original rule was at deterring abuses.[66] Commentators explained this lack of sanctioning as a reluctance on the judge's part.[67] However, the lack of Rule 11 motions prior to its amendment might also be directly related to a belief on the part of practitioners that absent any mandatory language, sanctions were not likely to be imposed, and any motion under Rule 11 was, therefore, a waste of time.[68] Whatever the reasons, it is obvious that since its amendment, Rule 11 is being used as a powerful litigation tool.[69] The adoption by the Fifth Circuit of a mandatory sanction upon violation of the Rule 11 is in line with both the drafters' intent[70] and with the decisions of other circuits.[71]

IV. TYPE OF SANCTION

One of the most important aspects of the *Thomas* case is the court's holding with respect to the type of sanction that should be imposed when a violation of Rule 11 is found.[72] Rule 11, as amended,

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254 n.7 (2d Cir. 1985)(where strictures of the rule have been transgressed, it is incumbent upon district court to fashion proper sanctions).

[65] The Rule states that if a violation is found to have occurred, then the court "*shall impose*" an appropriate sanction. FED. R. CIV. P. 11 (emphasis added). The Advisory Committee reiterated the mandatory aspect of the Rule by stating "[u]pon violation of the duties imposed by the rule, sanctions *shall be imposed* on the signing attorney . . . ." *Id.* Advisory Committee's Notes. (emphasis added).

[66] The *Thomas* court cites a study which reveals that between 1938 and 1976, there were only 19 reported cases where Rule 11 motions had been filed and that of this 19, violations were found 11 times and sanctions were imposed a mere three times. *Thomas*, 836 F.2d at 876 n.14 (citing S. Kassin, *An Empirical Study of Rule 11 Sanctions* 2 (Fed. Jud. Center 1985)). *Cf.* Vairo, *supra* note 4 at 199-203 (setting out statistics of Rule 11 motions subsequent to amendment).

[67] *See, e.g.*, Vairo, *supra* note 4, at 192 (giving several reasons for "judicial reluctance" to impose sanctions); Nelken, *supra* note 49, at 1321-22 (giving several reasons for reluctance of judges to impose sanctions); Schwarzer, *supra* note 25, at 183-84 (same).

[68] This view is supported by the drafters of the amendment who stated that "[t]he text of the amended Rule seeks to dispel apprehensions that efforts to obtain enforcement will be fruitless . . . ." FED. R. CIV. P. Advisory Committee's Notes.

[69] *See supra* note 4, in which the statistics cited illustrate just how important Rule 11 has become.

[70] *See supra* note 65.

[71] *See supra* note 64.

[72] *Thomas*, 836 F.2d at 876-78.

provides that two examples of appropriate sanctions are reasonable expenses and reasonable attorney's fees.[73] This may be one of the reasons that a majority of sanctions are in the form of monetary awards.[74] However, it should be realized that all sanctions are left to the discretion of the district court.[75] In *Thomas*, the court recognized that the district court possesses this discretion and should utilize it in tailoring an appropriate sanction.[76] However, the court also recognized that Rule 11 expressly provides for monetary sanctions[77] and therefore, there was a "natural tendency of district courts to gravitate toward imposing these types of sanctions."[78] The court noted the deterrent purpose of the rule and emphasized that sanctions should be both educational and rehabilitative in character.[79] To help achieve this purpose, the court adopted a principle that "the sanction imposed should be the least severe sanction adequate to the purpose of Rule 11."[80] After adopting this principle, the court set out alternatives to monetary sanctions that could be used by district courts, such as reprimand in open court or compulsory legal education.[81]

Since its amendment, Rule 11 has gradually lost its deterrent effect and has rapidly become a "fee-shifting" tool[82] because of the language in the rule which allows attorney's fees as an "appropriate sanction."[83] The *Thomas* court recognized this trend and through its holding has attempted to reverse it.[84] The court's reference to the educational and rehabilitative purposes of the rule[85] as well as its suggested alternative sanctions[86] may well serve to halt this "fee-shifting" trend. In a recent case, the Third Circuit addressed this problem and stated that "Rule 11 sanctions should not be viewed as a general fee-shifting device . . . ."[87] The Fourth Circuit has likewise confronted the issue and applied the "least severe sanction principle" adopted in the instant case and stated that "[i]t does not follow . . . that [defendant] is automatically entitled to an award of attorney's fees . . . ."[88]

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[73] Amended Rule 11 specifically allows a district court finding a violation to impose as sanctions "an order to pay to the other party or parties the amount of the reasonable expenses incurred . . . including a reasonable attorney's fee." Fed. R. Civ. P. 11

[74] One commentator found that in 96% of the cases studied, the courts awarded costs and attorney's fees as sanctions for Rule 11 violations. Nelken, *supra* note 49, at 1333.

[75] The fact that the Rule allows the court to impose "an appropriate sanction" is evidence of this discretion. Fed. R. Civ. P. 11. Also, the Advisory Committee specifically recognized that the district court "has discretion to tailor sanctions to the particular facts of the case . . . ." *Id.* Advisory Committee's Notes.

[76] *Thomas*, 836 F.2d at 876-77. The court briefly reviewed the history of the amendment to Rule 11 with respect to the discretionary language of the Rule and inferred therefrom that the broad discretion given to the district courts was "intended as a 'safety valve' to reduce the pressure of mandatory sanctions." *Id.* at 877.

[77] *See supra* note 73.

[78] *Thomas*, 836 F.2d at 877.

[79] *Id.* In discussing the deterrent aspect of the Rule, the court stated, "the imposition of sanctions pursuant to Rule 11 is meant to *deter attorneys from violating the Rule.*" *Id.*, citing Donaldson v. Clark, 819 F.2d 1551, 1556 (11th Cir. 1987)(emphasis in original).

[80] *Thomas*, 836 F.2d at 878. The circuit applied this standard in the pre-amendment case of Boazman v. Economics Laboratory, Inc., 537 F.2d 210, 212 (5th Cir. 1976), which involved the dismissal of a claim as the sanction.

[81] *Thomas*, 836 F.2d at 878. *See also* Schwarzer, *supra* note 25, at 201-04 in which the author specifically discusses the types of sanctions available.

[82] This "fee-shifting" trend is obvious from the voluminous amount of cases in

Commentators seem to differ on which sanction should be utilized. One author stated that it is safer to "limit sanctions to consequential expenses and attorney's fees . . . ."[89] However, another commentator, whose view is more in line with that of the *Thomas* court, stated that a consistent award of attorney's fees violates the purpose of Rule 11 because "[a]s Rule 11 becomes known as a fee-shifting device, satellite litigation will explode as prevailing parties try to recover their attorney's fees."[90] This same commentator goes on to state that "[i]f greater use is made of alternative sanctions . . . much of the vitriolic Rule 11 litigation, including appeals of denials of sanctions, will cease because

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which attorney's fees and/or litigation costs are the only sanction sought and/or awarded. Because the caseload in which attorney's fees have been awarded in whole or in part is so heavy, it is not possible to cite all such cases. However, a review of many of the previously cited cases reveals that most involve imposition of attorney's fees as the appropriate sanction. *See* Phelps, *supra* note 57 at 349 n.46 in which the author sets out an extensive list of cases in which the court awarded attorney's fees as the appropriate sanctions.

[83] *See supra* note 73.

[84] *Thomas*, 836 F.2d at 878. The *Thomas* court's imposition of a principle which requires the least severe sanction adequate to the purpose should deter district courts from automatically imposing attorney's fees as an "appropriate sanction." *Id.*

[85] *See supra* text accompanying note 79.

[86] *See supra* text accompanying note 81.

[87] Gaiardo v. Ethyl Corp., 835 F.2d 479, 483 (3d Cir. 1987). The court also stated that the Rule is misused when sanctions are sought against a party merely because they were unsuccessful in their claim. *Id.*

[88] Cabell v. Petty, 810 F.2d 463, 466 (4th Cir. 1987).

[89] Schwarzer, *supra* note 15, at 203. The author stated that any award of fees must be attributable to the "offending paper." *Id.* It is interesting to note that in Judge Schwarzer's most recent article, he seems to have reversed his earlier view and now suggests that awarding fees does not fulfill the purpose of the Rule which is to deter abuses. Schwarzer, *supra* note 3, at 1020.

[90] Vairo, *supra* note 4, at 231.

the 'prevailing' party will no longer be lured by the prospect of recovering its fees."[91] Since neither satellite litigation[92] nor fee-shifting was intended by the drafters of the amendment,[93] then the *Thomas* court's adoption of the "least severe sanction principle" in an effort to streamline litigation and stop this "fee-shifting" trend satisfies the drafters' original intentions.[94]

V. Duty to Mitigate

The *Thomas* court recognized that under the language of Rule 11, an award of attorney's fees and expenses is limited to a reasonable amount and *must* have been caused by a violation of the rule.[95] The court felt that any monetary award had to be scrutinized in conjunction with the rule's other goals of "deterrence, punishment and compensation."[96] Therefore, it noted that actual expenses may not always be reasonable expenses.[97] The court perceived that findings by the district court on "reasonableness" of expenses were necessary to ensure that the party seeking the sanction was not responsible for the inflation of the expenses and fees.[98]

The Advisory Committee's Notes to Rule 11 contain the following language: "[a] party seeking sanctions should give notice to the court and the offending party promptly upon discovering a basis for doing so."[99] In Thomas, the court recognized the inequities that would occur if a party was allowed to "run up" fees and/or expenses by responding to papers which are known to be in violation of Rule 11.[100] To prevent these inequities, it held that the party seeking monetary sanctions has a *duty* to mitigate the amount of the sanction.[101] The court felt that in addition to reducing monetary awards, the prompt notice requirement would both conserve judicial time and deter future violations.[102] It set out various methods of giving notice[103] and stressed that any notice given should be made part of the record.[104]

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[91] *Id.* The author of this article cites the *Thomas* opinion with approval. *Id.*

[92] *See supra* note 56.

[93] The purpose of the Rule was to "deter abusive tactics" and "streamline litigation"; *see supra* text accompanying note 3. Fed. R. Civ. P. 37 specifically provides for fee-shifting with respect to discovery related sanctions and, therefore, shows that the drafters knew how to provide for such a process when they so intended.

[94] Supporting the view that the *Thomas* holding is in line with the intentions of the drafters of the amendment is the citation in *Thomas* of a statement by the Advisory Committee Chairman, Judge Mansfield, made during the hearings on the proposed amendment that "[a] judge would have discretion to impose a '*de minimus*' sanction." *Thomas*, 836 F.2d at 877.

[95] *Thomas*, 836 F.2d at 878-79.

[96] *Id.* at 879.

[97] *Id.* This was an adoption of a view that was applied by other circuits. *See, e.g.* INVST Fin. Group v. Chem-Nu-Clear Scs., 815 F.2d 391, 404 (6th Cir. 1987)("Reasonable" does not necessarily mean actual expenses), *cert. denied*, 108 S.Ct. 291 (1987); *In re* TCI Ltd., 769 F.2d 441, 448-49 (7th Cir. 1985)(same).

[98] *Thomas*, 836 F.2d at 879.

[99] Fed. R. Civ. P. 11 Advisory Committee Notes.

The court also stated that it would not be proper for a district court to "remain idle in the face of possible violations".[105] This language effectively shifts the affirmative duty to mitigate sanctions to the court. Since the Advisory Committee's Notes do not address whether courts are under such a duty then it is not clear whether the drafters intended as much.

The court cautioned that when imposing sanctions primarily as a deterrent, then a determination of whether the fees and expenses were reasonable[106] was not dependent on the steps taken by the movant to mitigate those expenses.[107] It felt that in determining an appropriate sanction, the important factors for consideration were the "conduct and resources" of the violating party.[108] However, it reiterated that the time of the imposition of sanctions had to have a "nexus to the behavior sought to be deterred."[109] The court did go on to stress that it is not improper to withhold a *decision* on sanctions until the end of trial but, that courts should "at a minimum" notify the offending party that sanctions may be assessed at a later date.[110] This language again illustrates that the holding imposes the duty to mitigate on both parties and the judiciary.

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[100] *Thomas*, 836 F.2d at 881.

[101] *Id.* at 879. The court stated that any failure to mitigate may result in a reduction of the award or even a denial of any award. *Id.*

[102] *Id.*

[103] *Id.* at 880. The court stated that notice could be by "personal conversation, an informal telephone call, a letter or a timely Rule 11 motion." *Id.*

[104] *Id.* The court felt that the requirement of making the notice part of the record was needed in order to "avoid misunderstanding and permit appellate review . . . ." *Id.*

[105] *Id.* at 881.

[106] *See supra* notes 95-98 and accompanying text.

[107] *Thomas*, 836 F.2d at 881.

[108] *Id.* (citing Nelken, *supra* note 49 at 1336-38). Therefore, the *Thomas* court believed that an award that is high, but not disproportionate to the violation, may be reduced based upon such things as the financial ability of the sanctioned party to pay. *Id.* For a discussion of cases which have reduced an award due to extenuating circumstances, see Nelken, *supra* note 49, at nn.149-165 and accompanying text.

[109] *Thomas*, 836 F.2d at 881. The court stated that this "nexus" was of particular importance when sanctions are being imposed *sua sponte*. *Id.*

[110] *Id.*

The Fifth Circuit's holding on the mitigation issue is in line with the position of many of the other circuits.[111] In fact, the Fifth Circuit had previously applied this standard in a Rule 11 case.[112] However, the language of the court's holding now seems to impose this affirmative duty of mitigation on the court as well as the party seeking sanctions.[113] Although it is obvious that the drafters of the Rule 11 amendment intended that a party seeking sanctions should be under a duty to mitigate any award,[114] it is not so clear that the drafters intended this duty to apply to the judicial bar as well.

VI. NECESSITY OF MAKING FINDINGS OF FACT AND CONCLUSIONS OF LAW

In the original *Thomas* opinion, the panel held that the district court *must* make conclusions of law and findings of fact in *every* case in which Rule 11 sanctions are requested.[115] However, it did feel that the "district court should rely on the record as much as possible."[116] It suggested that such findings and conclusions may require "independent proceedings" to develop the record.[117] The Seventh Circuit specifically rejected the rule formulated by the panel in *Thomas* which imposed such a duty on the district courts.[118]

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[111] *See e.g.* Gaiardo v. Ethyl Corp., 835 F.2d 479, 483 (3d Cir. 1987)(stating that there is duty of mitigation); Brown v. Fed'n of State Medical Bds, 830 F.2d 1429, 1439 (7th Cir. 1987)(same); *In re* Yagman, 796 F.2d 1165, 1185 (9th Cir. 1986)(when determining "reasonable" award, it is "[i]mplicit" to realize that there is duty to mitigate). *See also*, Donaldson v. Clark, 819 F.2d 1551, 1560 (11th Cir. 1987)(party seeking sanctions should give prompt notice); Stevens v. Lawyers Mutual Liability Ins. Co. 789 F.2d 1056, 1061 (4th Cir. 1986)(sanctions denied due to delay of filing motion).

[112] Trevino v. Holly Sugar Corp., 811 F.2d 896 (5th Cir. 1987). In *Trevino*, the defendants also sought an award of attorney's fees under 42 U.S.C. § 1998, 42 U.S.C. § 2000e-5(k) and 28 U.S.C. § 1927. *Trevino*, 811 F.2d at 906. In *Trevino*, the district court held that a "general challenge" to all of the plaintiff's claims was insufficient to "preserve claims as to each motion separately . . . ." *Id.* at 908. Therefore, the panel upheld the district court's ruling that sanctions were not available because defendant's Rule 11 motion was not timely filed. *Id.*

[113] *See supra* notes 105 & 110 and accompanying text.

[114] The language in the Advisory Committee's Notes states that a party should promptly notify an offending party of a violation of Rule 11 evidences the drafters' intention that there is a duty to mitigate. *See supra* note 99 and accompanying text.

[115] *Thomas*, 812 F.2d at 989. The court stated that findings and conclusions must be made on each of the following Rule 11 requirements:

> (1)whether reasonable inquiry into the facts was made;
> (2)whether reasonable inquiry into the law was made;
> (3)whether the action was taken to harass, delay or increase unnecessarily costs of litigation; and
> (4)whether an attorney has met his continuing obligation to reevaluate his litigation position.

Id.

[116] *Id.* This holding reflected the language of the Rule 11 Advisory Committee's

Upon rehearing *en banc*, the court abandoned this rule and adopted a rule that did not require specific findings and conclusions by district courts in every Rule 11 case.[119] However, the court opined that if the imposition of a sanction were to preclude a party access to the court, the district judge must either: (1) provide that the sanction is payable only at a date that coincides with or follows entry of a final order terminating the litigation; or (2) make express written findings, after a prompt hearing, as to why the award does not have such a preclusive effect.[120]

In addition, the court continued to stress the importance of developing an adequate record which would be suitable for appellate review.[121] The particular circumstances of each case would determine the extent to which any specific explanation would have to be contained in

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Notes which stated that the district court should, "limit the scope of sanction proceedings to the record." FED. R. CIV. P. 11 Advisory Committee's Notes.

[117] *Thomas*, 812 F.2d at 989. The court felt that such proceedings were also contemplated by the drafters of the amendment since they felt that any proceedings should be limited to the record only to the extent possible. *Id.* The court also "recognized" that such proceedings may be necessary since the Rule is complex and is also being frequently utilized. *Id.* The court did not mention the type of "proceedings" to which it was referring, however, it probably referred to discussing discovery proceedings, hearings, and the like.

[118] *See* Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1084 (7th Cir. 1987)(expressly rejecting *Thomas* court rule of requiring findings of fact in every Rule 11 case). The court stated that the party seeking sanctions in *Szabo* was entitled to an explanation for the dismissal of his sanction motion and, therefore, remanded the case. *Id.*

[119] *Thomas*, 836 F.2d at 883.

[120] *Id.* at 882-83 n.23. The court noted that this rule would be consistent with their previous ruling that "orders awarding Rule 11 sanctions prior to the entry of a dispositive order terminating the litigation [were] not final appealable orders for purposes of 28 U.S.C. § 1291." *Id.* (quoting Click v. Abilene Nat'l Bank, 822 F.2d 544, 545 (5th Cir. 1987)).

[121] *Id.* at 883. The court enunciated that a record consisting of brief findings and conclusions served to:

> (1)assist in appellate review, demonstrating that the trial court exercised its discretion in reasoned and principled fashion; (2) they help assure the litigants, and incidentally the judge as well, that the decision was the product of thoughtful deliberation, and (3) their publication enhances the deterrent effect of the ruling.

Id. (quoting Schwarzer, *supra* note 25, at 199).

the record.[122] The court also noted the double-edged sword effect of requiring competent records, in that it was available to a movant who had obtained a significant award as well as a litigant who defeated a Rule 11 motion.[123] It concluded that when the basis for a Rule 11 decision is not determinable from the record, then it would be necessary to have an explanation from the trial judge and, in the absence thereof, a remand for such findings would have to be made.[124]

The new rule adopted by the *Thomas* court upon rehearing more closely parallels the intentions of the drafters of the amendment to Rule 11. The drafters of the amendment felt that the scope of proceedings on a sanction issue should be primarily limited to the record.[125] To satisfy this intention, the court stressed the need for an adequate record, even to the point where a remand of the case might be necessary if the record was found to be inadequate.[126] Therefore, the district court will now have to make a subjective determination of the seriousness of the violation as well as the merits prompting the Rule 11 motion.[127] If it is determined that the violation is serious or that the motion is justified, then the record should properly reflect these findings. Absent a reflection on the records, then, and only then, would it be necessary for the district court to make findings of fact and conclusions of law in order that any rulings on the Rule 11 motion would be properly developed for appellate review.

The *Thomas* decision on rehearing should effectively inform the district courts of when they will be required to make findings of facts and conclusions of law for the record. More importantly, it will relieve them of the "onerous duty and often time-consuming burden" imposed upon them by the original *Thomas* panel.[128] The original rule was clearly unworkable given the frequent use of Rule 11 motions[129] in an already congested district court system. The practicality of this new rule should work well to avoid satellite litigation, and therefore, streamline the litigation process in Rule 11 cases.

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[122] *Id.* Such circumstances include the severity of the violation, the possible effects of the award, and the significance of the sanctions. *Id.*

[123] *Id.* The court noted that litigants should strive to make a complete record suitable for appeal by requesting an explanation from the court "at the earliest moment after sanctions are imposed or denied." *Id.* at 883 n.24.

[124] *Id.* at 883. The Seventh Circuit similarly requires such an explanation when the record does not adequately reflect the reasons for the court's ruling. *See* Szabo Food Serv., Inc. v. Canteen Corp., 823 F.2d 1073, 1084-85 (7th Cir. 1987)(court noted that Rule 11 motion sought more than $10,000 in attorney's fees which would have supported entire lawsuit under diversity jurisdiction; therefore, Rule 11 motion was serious, and interested litigants and appellate court were entitled to explanations); Brown v. Fed'n of State Medical Bds. of the United States, 830 F.2d 1429, 1438 (7th Cir. 1987)(court remanded case for more specific reasons for imposition of sanction amounting to $30,000; court noted they would request specificity in reasons anytime substantial award was involved).

[125] FED. R. CIV. P. Advisory Committee's Notes. *See also supra* note 116.

[126] *Thomas*, 836 F.2d at 883. The court explained that "when the basis and jurisdiction for a Rule 11 decision is *not readily discernible on the record*, an adequate explanation by the trial court for the decision will be necessary." *Id.* (emphasis added).

[127] *See supra* note 122 and accompanying text.

VII. THE EFFECT OF THOMAS ON "CHILLING"

When Rule 11 was amended, the drafters did not intend for it to "chill" an attorney's pursuit of either factual or legal theories.[130] Despite this language, it was quickly recognized that the amended rule would have just such an effect, prompting commentators to criticize the rule and its possible implications.[131] It is obviously impossible to determine exactly how much of a "chilling effect" Rule 11 has given rise to since the only reference points are reported decisions in which the threat of possible sanctions did not stifle the attorney's pursuit of the claim. However, a possible exception may be developing for the attorney who specializes in civil rights or employment discrimination litigation. Statistics indicate that approximately one-third of all reported Rule 11 cases have concerned these types of cases.[132] In over seventy-one percent of these cases, the plaintiff's attorney has been sanctioned.[133] It is conceivable that an attorney's pursuit of a "marginal" claim in this field will be retarded if they are influenced by these statistics. Granted that statistics are often misleading or misconstrued, the foregoing numbers cannot be interpreted as having anything but a "chilling effect" on attorneys specializing in these fields.

The *Thomas* decision will have a significant effect on this "chilling" aspect of Rule 11. Although the court held that sanctions are mandatory,[134] its discussion on the appropriate sanction and its admonition that an award of fees is not always available[135] will curb the rule's "chilling effect." With the financial enticement of an award of attorney's fees substantially decreased, the excessive use of Rule 11 motions will proportionally decrease. Likewise, if an attorney can file a claim, which he feels is meritorious, without fear of an automatic sanction of attorney's fees, then the rule does not have the effect of "chilling" creative advocacy. Since the *Thomas* opinion has effectively removed both this "enticement" as well as this "fear," then the decision has gone far toward fulfilling the intentions of the drafters[136] and eliminating the "chilling" effect that has evolved.

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[128] *Thomas*, 836 F.2d at 883. *See supra* note 115 and accompanying text.

[129] *See supra* note 4 and accompanying text.

[130] The Advisory Committee specifically stated, "[T]he rule is not intended to chill an attorney's enthusiasm and creativity in pursuing factual or legal theories." FED. R. CIV. P. 11, Advisory Committee's Notes.

[131] *See, e.g.*, Vairo, *supra* note 4, at 232-33 (criticizing amended Rule 11, but then referring to it as necessary evil); Nelken, *supra* note 49, at 1353 (arguing that accomplishment of Rule 11's stated goals will be hindered by using it as wide-ranging vehicle for punishment); Note, *supra* note 1, at 651 ("danger of conflict between Rule 11 and the liberal pleading scheme has been borne out in practice"); Snyder, *The Chill of Rule 11*, 11 LITIGATION 16, 55 (1984) (Rule 11 will stifle legitimate innovation in courts). *But see* Schwarzer, *supra* note 25 (praising Rule 11's positive aspects).

[132] Vairo, *supra* note 4 at 200-01.

[133] *Id.* This figure is 17.3% higher than the average for plaintiff attorneys' in all other cases. *Id.*

VIII. Conclusion

In August of 1983, Rule 11 of the Federal Rules of Civil Procedure took on a new life. Prior to that time the rule was an obscure and rarely-used litigation tool.[137] However, the amended rule has literally changed the practice of law in the federal courts. The sweeping amendment of the rule imposed new duties and standards upon both attorneys and parties as well as the courts.[138] The rule has proven to be confusing especially with respect to the proper application of these new standards. This confusion may be directly related to the fact that the rule itself provides very little guidance to either the judicial or litigation groups. Exacerbating the entire situation is the inadequacy of the Advisory Committee Notes, which are the only means of deciphering the intentions of the drafters of the amendment.

Rule 11 cases in the Fifth Circuit have experienced a steady incline since the 1983 amendment.[139] However, the construction and application has been anything but steady or uniform. In an attempt to ameliorate this incongruity, the Fifth Circuit chose the case *sub judice*, as exemplary of most Rule 11 cases, to hear *en banc*. The court effectively dissected the case into basic Rule 11 issues. As discussed herein some of the holdings made by the court are deficient. For instance, the across-the-board abuse of discretion standard of review adopted does not seem workable.[140] In addition, the imposition of a duty to mitigate on the court does not seem to be in harmony with the drafters' intentions.[141] However, other conclusions of the court truly satisfy the drafter's intentions. The mandatory application of sanctions for a violation of the rule,[142] as well as the abandonment of the requirement that the district court judge make specific findings of fact in all Rule 11 cases,[143] are examples of this. Of paramount importance is the court's holding that an award of attorneys fees is not always appropriate.[144] The use of the rule as a "fee-shifting" device has been the main catalyst behind the explosion of Rule 11 motions. The use of the rule for such purposes was never the intention of the drafters[145] and was clearly contrary to the American Rule.[146] The court's holding on this issue should effectively reform the misuse and misinterpretation of the rule.

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[134] *See supra* notes 59-71 and accompanying text.

[135] *See supra* notes 72-94 and accompanying text.

[136] *See supra* note 130.

[137] *See supra* note 66 and accompanying text.

[138] *See supra* note 2.

[139] In 1983 there were no reported Rule 11 decisions, however, since that time there has been 1 in 1984, 3 in 1985, 10 in 1986, and 12 in 1987. Vairo, *supra* note 4 at app. 238.

With its decision in *Thomas*, the Fifth Circuit has developed a workable approach to Rule 11 cases. Because the United States Supreme Court has not yet addressed the Rule 11 issue, the circuit courts are the only authority to which practitioners can look when determining what their proper conduct should be. Although somewhat defective, the *Thomas* opinion is the most effective and coherent analysis of how Rule 11 should and will be construed in the Fifth Circuit, and will serve as an excellent guideline for both the judicial and litigation bars.

David P. Salley

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[140] *See supra* notes 35-36 and accompanying text.

[141] *See supra* text at notes 105 and 110.

[142] *See supra* notes 59-63 and accompanying text.

[143] *See supra* note 119 and accompanying text.

[144] *See supra* notes 73-81 and accompanying text.

[145] *See supra* note 93.

[146] The American Rule provides that a party not prevailing in a court case is not responsible for her opponent's attorneys fees. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247-71 (1975)(extensive opinion on use of American Rule in United States).

RECENT DECISIONS

Securities Regulation — Rule 10b-5 — Fifth Circuit Fraud on the Market Theory Applicable to Violations of Rule 10b-5(a) and (c) Involving Marketable Securities

Plaintiff[1] brought an action under section 10(b) of the Securities Exchange Act of 1934[2] and Rule 10b-5 of the Securities Exchange Commission[3] in the United States District Court for the Northern District of Texas[4] against the defendant[5] to recover damages for fraudulent misrepresentations and nondisclosures[6] that allegedly induced the plaintiff to purchase shares in defendant corporation at artificially inflated prices.[7] The plaintiff asserted that the fraud on the market theory[8] circumvented the requirement of proving specific reliance on the

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[1] The plaintiff was Hannah Finkel. Finkel v. Docutel/Olivetti Corp., 817 F.2d 356, 357 (5th Cir. 1987).

[2] *Id.* The relevant portion states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> . . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b)(1985).

[3] *Finkel*, 817 F.2d at 357. The claim alleged that the defendant violated the Securities and Exchange Commission Rule 10b-5 (employment of manipulative and deceptive devices) which states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of material fact or to omit to state a material fact necessary in order to make the statements make, in light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (1987). Furthermore, the court noted that the text of Rule 10b-5

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pointed to a distinction between nondisclosure actions under §§ (a) and (c), and positive misrepresentation actions under §(b). *Finkel*, 817 F.2d at 359-60.

[4] *Finkel*, 817 F.2d at 356.

[5] *Id.* at 357. The defendant, Docutel Corporation, was a publicly owned and traded corporation whose shares were traded in an over the counter market. *Id.* at 358. In 1982, Docutel merged with Olivetti Corporation of America to expand its product line. *Id.* As a result, a subsidiary of Olivetti controlled forty-six percent of the shares in Docutel. *Id.* at 357 n.1. Thereafter, in 1985 Docutel was merged with a subsidiary of Docutel, and renamed Olivetti, U.S.A., Inc. *Id.*

[6] *Id.* at 357. The plaintiff asserted that Docutel concealed large inventory write-downs between April 29, 1983 and February 16, 1984. *Id.* at 358. Thus, the plaintiff maintained that purchasers of Docutel stock were defrauded during this period. *Id.* On December 5, 1983, plaintiff purchased 300 shares of Docutel at $14-⅝ per share. *Id.* The plaintiff filed suit for herself and others who purchased shares in Docutel between April 29, 1983 and February 16, 1984. *Id.* at 358 n.4.

[7] *Id.* at 358. The gist of the complaint asserted that the defendant delayed the disclosure of large inventory write-downs in order to maintain the deceptively high price of its stock. *Id.* In 1983, Docutel reported $10,900,000 in inventory write-downs, of which nearly $10,100,000 were reported in the fourth quarter. *Id.* The plaintiff maintained that the overstatement of inventory compromised the integrity of the market price of Docutel Stock. *Id.* at 357. In 1983, Docutel Stock reached a high of $38-⅞. *Id.* at 358. However after reporting an $18,263,000 loss, including inventory write-downs, Docutel stock closed at $7-¼. *Id.* Therefore, the plaintiff maintained, she was entitled to damages as a result of the manipulation of the market price of Docutel shares. *Id.* at 357. Furthermore, the plaintiff contended that Olivetti of America controlled Docutel and used Docutel to conceal its own losses by purchasing Olivetti's inventories at inflated prices. *Id.* at 358. In 1983, Docutel purchased Olivetti of America's inventories for $102,105,000, but concealed this fact until the year-end audit forced Docutel to take large inventory write-downs. *Id.* As a result, the plaintiff maintained that purchasers of Docutel stock were defrauded during this period of nondisclosure. *Id.*

[8] *Id.* at 357. The fraud on the market theory is based on the assumption that the price of securities on the open market reflects all available information on those securities. *Id.* at 360. Therefore, since corporations are required to disclose information, any false statement of negative or positive information pertaining to the stock will distort the market's pricing mechanism. *Id.* Thus, if a corporation misrepresents material information concerning its stock, then the fraud on the market theory dispenses with the requirement of individual reliance and accepts market reliance on the deceptive information to create the presumption of reliance. *Id.* at 359. The presumption of reliance shifts the burden to prove non-reliance to the defendant. *Id.* In effect, the fraud on the market theory relieved the defrauded purchaser of the difficulty of proving reliance in complex nondisclosure schemes intended to defraud purchasers of stock. *Id.* at 361. *See generally* Rischel, *Use of Modern Finance Theory in Securities Fraud Cases Involving Actively Traded Securities*, 38 BUS. LAW. 1 (1982)(comparative explanation of fraud on the mar-

defendant's misconduct.[9] In opposition, the defendant argued that application of the fraud on the market theory under Rule 10b-5 was restricted to those actions involving securities that would have been unmarketable without a fraudulent presentation.[10] The district court dismissed the complaint.[11] On appeal, the United States Court of Appeals for the Fifth Circuit, *held*, affirmed in part,[12] reversed in part and remanded.[13] In instances where an investor can establish a scheme to defraud or a course of business operating as a fraud that artificially inflates the price of marketable securities, the fraud on the market theory establishes a rebuttable presumption of reliance under Rule 10b-5(a) and (c). *Finkel v. Docutel/Olivetti Corp.*, 817 F.2d 356, 363 (5th Cir. 1987).

Courts have consistently construed federal securities law[14] to im-

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ket theory and traditional approach to Rule 10b-5 action).

[9] *Id.* at 358.

[10] *Finkel*, 817 F.2d at 361. Defendant maintained that the theory of fraud on the market was limited to those actions involving securities that were not marketable without a fraudulent presentation in the market. *Id.*

[11] *Id.* at 358. The trial court concluded that the fraud on the market theory was applicable only in those actions involving unmarketable securities. *Id.* Traditionally, in actions under Rule 10b-5, proof of individual reliance established the requisite causal connection between the defendant's misconduct and the plaintiff's injury. *Id.* at 359. Thus, the trial court dismissed the complaint for failure to plead individual reliance. *Id.* at 358.

[12] *Id.* at 362. The court held that the fraud on the market theory was not available in misrepresentation actions under section (b) of Rule 10b-5. *Id.* Therefore, the court affirmed the trial court's dismissal of plaintiff's claim under Rule 10b-5(b). *Id.* at 363.

[13] *Id.* The court held that the fraud on the market theory was applicable to nondisclosure actions under sections (a) and (c) of Rule 10b-5. *Id.* Furthermore, the court found that the fraud on the market theory was applicable to actions involving actively traded or newly issued securities. *Id.* at 364. Therefore, the court reversed the trial court's dismissal of the claims under Rule 10b-5(a) and (c). *Id.* at 362.

[14] 15 U.S.C. §§ 77a, 78a (1985). The stock market crash of 1929 led to the passage of the Securities Act of 1933, and the Securities Exchange Act of 1934. *Id.* The drafters explained that the Securities Act was intended to

> Prevent further exploitation of the public by the sale of unsound, fraudulent, and worthless securities through misrepresentation; to place adequate and true information before the investor; to protect honest enterprise, seeking capital by honest presentation against the competition afforded by dishonest securities offered to the public through crooked promotion.

S. Rep. No. 47, 73rd Cong., 1st Sess. 1 (1933). Thereafter, in 1934, the Securities Exchange Act was passed to restore confidence in the markets and to establish measures to protect the market's pricing function from the manipulative effects of fraudulent acts or schemes. H.R. Rep. No. 1383, 73rd Cong., 2nd Sess. 11 (1934). *See generally*, L. Loss, Fundamentals of Securities Regulation (1983)(comprehensive examination of 1934 Act); Note, *Fraud on the Market: An Emerging Theory of Recovery Under SEC Rule* ply a private cause of action under Rule 10b-5.[15] This judicially created

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10b-5, 50 GEO. WASH. L. REV. 627, 648 (1982)(validity of corporate disclosures of information controls integrity of market forces); Note, *The Fraud on the Market Theory: A Unified Concept of Causation in Rule 10b-5 Open Market Actions*, 12 LOY. U. CHI. L.J. 727, 728 (1981)(securities law protects investors from stock market abuses); Comment, *Securities Regulation: The Fraud-on-the-Market Theory and Its Effect on the Reliance Requirement for a Private Action Under 10b-5*, 13 STETSON L. REV. 343, 343 n.2 (1984)(goal of securities regulation is to establish high standard of business ethics in securities industry).

Section 10(b) of the Securities Exchange Act is a general provision that allows the Securities and Exchange Commission (S.E.C) to regulate fraud. 15 U.S.C. § 78(b)(1985). Section 10(b) is limited to the sale or purchase of securities. 15 U.S.C. § 78(b). Furthermore, § 10(b) was intended as a catchall for the prevention of existing and newly developed devices to defraud investors. Ernst & Ernst v. Hochfelder, 425 U.S. 185, 202-03 (1976)(accomplices in spurious escrow scheme must also meet requisite scienter standard under Rule 10b-5). Within the purview of § 10(b) the S.E.C. promulgated Rule 10b-5 to further the scheme of securities regulation. *See supra* note 3. In 1942 the S.E.C. promulgated Rule 10b-5 through a congressional grant of authority to prescribe rules in the public interest and to protect investors. Rule 10b-5, SEC Exchange Act Release No. 3220, 7 Fed. Reg. 3804-05 (1942). Rule 10b-5 has been used in a variety of circumstances. *See e.g.*, Healey v. Catalyst Recovery of Pennsylvania, Inc., 616 F.2d 641, 650-51 (3d Cir. 1980)(corporate misrepresentations deprived shareholders of their opportunity to enjoin corporate merger); Heit v. Weitzen, 402 F.2d 909, 913-14 (2d Cir. 1968), (nondisclosure of material facts in 10k report violated Rule 10b-5), *cert. denied*, 395 U.S. 903 (1969); SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 854 (2d Cir. 1968)(insider trading on unpublished information violated Rule 10b-5), *cert. denied*, 394 U.S. 976 (1969).

The courts have construed securities law in a broad and flexible manner. SEC v. Capital Gains Bureau, 375 U.S. 180, 195 (1963). In *Capital Gains*, the Court found that investor scalping was a fraud or deceit within the prohibition of securities law. *Id.* at 181-83. The Court reasoned that securities law must be construed in a flexible manner to ensure its remedial goals. *Id.* at 195. *See e.g.*, Superintendent of Insurance v. Bankers Life & Casualty Co., 404 U.S. 6, 11 n.7 (1971)(broad interpretation of Rule 10b-5 was required to meet objectives of securities regulation). *But see* Chiarella v. United States, 445 U.S. 222, 232-33 (1980)(no action under Rule 10b-5 for silence when no duty to disclose); Santa Fe Industries v. Green, 430 U.S. 462, 472-80 (1977)(no action under 10b-5 for substantive unfairness if there is full disclosure); *Ernst & Ernst*, 425 U.S. at 212-15 (negligence was not enough to establish requisite scienter under Rule 10b-5); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 749-55 (1975)(Rule 10b-5 recovery restricted to actual purchasers or sellers).

[15] Superintendent of Insurance v. Banker's Life & Casualty Co., 404 U.S. 6, 13 n.9 (1971); Kardon v. National Gypsum Co., 69 F.Supp. 512, 513 (E.D. Pa. 1946). *Kardon* was the first federal court to imply a private cause of action under Rule 10b-5. *Id.* at 513. The court in *Kardon* reasoned that a conspiracy of misrepresentations to purchase stock far below its true value violated the protected interest afforded investors under Rule 10b-5. *Id.* at 514. In *Superintendent of Insurance*, the United States Supreme Court acknowledged a private right of action under Rule 10b-5. *Superintendent of Insurance*, 404 U.S. at 13 n.9. In *Superintendent of Insurance*, two corporate officials conspired to use the corporation's own assets to purchase the controlling interest in the corporation. *Id.* at 8. The Court held that a private cause of action under Rule 10b-5 was available to

cause of action is based on common law deceit.[16] However, the burdensome element of actual reliance has historically barred the claims of many defrauded investors who failed to rely on specific misrepresentations or omissions.[17] As a consequence, a controversy has erupted involving the use of the fraud on the market theory[18] to relax the strin-

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individuals or corporations defrauded by violations of Rule 10b-5. *Id.* at 12.

[16] Huddleston v. Herman & MacLean, 640 F.2d 534, 543 (5th Cir. 1981). The courts have molded the common law elements of deceit into the requisite elements of a Rule 10b-5 private cause of action. *Id.* Accordingly, a plaintiff must establish: (1) scienter, (2) materiality, (3) reliance, and (4) causation. *Id.* First, scienter was defined as intent to deceive, manipulate, or defraud. *Ernst & Ernst*, 425 U.S. at 194 n.12, 214. The second element, materiality, requires that there be a substantial likelihood that a reasonable investor would have considered the misrepresentation or omission important in the investment decision. T.S.C. Industries v. Northway, 426 U.S. 438, 449 (1976). In *Northway*, the United States Supreme Court established a materiality test pertinent to § 14(e) actions for improper proxy solicitation. *Id.* at 449. Nonetheless, courts have applied the materiality test to actions under Rule 10b-5. *See, e.g.*, Simpson v. Southeastern Investment Trust, 697 F.2d 1257, 1259 (5th Cir. 1983)(court found no reason to require different materiality standard under Rule 10b-5); Harmsen v. Smith, 693 F.2d 932, 946 n.11 (9th Cir. 1982)(misrepresentations met materiality standard established in *Northway*); Trecker v. Scag, 679 F.2d 703, 709 (7th Cir. 1982)(misrepresentations and actions did not alter total mix of information in violation of materiality standard); Austin v. Loftsgaarden, 675 F.2d 168, 176 n.17 (8th Cir. 1982)(test for materiality is same under all securities regulations); Elkind v. Ligget & Myers, Inc., 635 F.2d 156, 166 (2d Cir. 1980)(court used both old and new materiality standards). *Cf.* W. PROSSER & W. KEETON, PROSSER AND KEETON ON TORTS § 105, at 728 (5th ed. 1985)(elements of common law deceit).

In addition, the third element requires that the plaintiff have justifiably relied on the misrepresentations or omissions made by the defendant. Dupuy v. Dupuy, 551 F.2d 1005, 1014 (5th Cir. 1977)(court reasoned that reliance in good faith coupled with exercise of reasonable care enhanced securities regulation). Finally, the plaintiff must have suffered the loss as a result of the alleged deception. Schlick v. Penn-Dixie Cement, 507 F.2d 374, 380 (2d Cir. 1974).

[17] *Dupuy*, 551 F.2d at 1014. Actual reliance on misrepresentations was required in an action concerning § (b) of Rule 10b-5. *Id.* In addition, an investor's reliance must be based on the exercise of care and good faith. *Id.*; *see* Vervaecke v. Chiles, Heider & Co., 578 F.2d 713, 718 (8th Cir. 1978)(plaintiff must directly rely on affirmative misstatements); City Nat'l Bank v. Vanderboom, 422 F.2d 221, 230 n.10 (8th Cir.)(reasonable reliance required as condition to private actions under Rule 10b-5), *cert. denied*, 399 U.S. 905 (1970); Clement A. Evans & Co. v. McAlpine, 434 F.2d 100, 104 (5th Cir. 1970)(plaintiff required to exercise reasonable diligence in 10b-5 action). *But see* Rifkin v. Crow, 574 F.2d 256, 262-63 (5th Cir. 1978)(court found gap in Rule 10b-5 protection when injured investor could not establish direct reliance on defendant's misrepresentation).

[18] *Finkel*, 817 F.2d at 360. This is known as the efficient market hypothesis. *Id.* at 360 n.8. In an efficient capital market, the price of the stock at a given time accurately reflects what the price will be in the future. Fischel, *Use of Modern Finance Theory in Securities Fraud Cases Involving Actively Traded Securities*, 8 BUS. LAW. 1, 4 n.9 (1982). Accordingly, the market price provides a summary of all available information,

gent Rule 10b-5 reliance requirement.[19] In the early stages of the controversy, the Second Circuit rendered a decision in *List v. Fashion Park*[20] that rejected the requirement of active reliance.[21] In *List*, the plaintiff charged that the defendants conspired to use inside information to purchase shares from minority stockholders,[22] and then to resell

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good or bad, concerning the stock. *Id.* at 9-10. *See generally* Gilson & Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 549 (1984)(why price adjustments occur so rapidly in securities markets). The fraud on the market theory enables investors to rely on the information provided by the market as though the information were directly transmitted by the issuer. *Finkel*, 817 F.2d at 360. The market is analogous to an agent for investors. *Finkel*, 817 F.2d at 360. The fraud on the market theory protects investors who unwittingly rely on a market distorted by misrepresentations. Note, *Fraud on the Market: An Emerging Theory of Recovery Under SEC Rule 10b-5*, 50 GEO. WASH. L. REV. 627, 629 (1982). *See generally* Kripke, *The Myth of the Informed Layman*, 28 BUS. LAW. 631 n.1 (1973)(disclosure of corporate information is usually not useful to average investor); Note, *Broker Investment Recommendations and the Efficient Capital Market Hypothesis: A Proposed Cautionary Legend*, 29 STAN. L. REV. 1077, 1078 (1977)(average investor relied on broker, or his own hunch). The court noted that courts and scholars have accepted the fraud on the market theory. *Finkel*, 817 F.2d at 361; *see* Authur Young & Co. v. United States, 549 F.2d 686, 696 (9th Cir. 1977)(court accepted procedural innovations offered by fraud on the market theory); Rose v. Arkansas Valley Environment & Utility Authority, 562 F. Supp. 1180, 1201 (W.D. Mo. 1983)(fraud on the market theory applied only to Rule 10b-5 actions involving unmarketable securities purchased on open market); Dekro v. Stern Brothers & Company, 540 F.Supp. 406, 411 (W.D. Mo. 1982)(causation under Rule 10b-5 was not limited to showing of affirmative reliance on offering circular); Frankel v. Wyllie & Thornhill, Inc., 537 F.Supp. 730, 737 (W.D. Va. 1982)(court anticipated acceptance of fraud on the market theory). *See generally* Black, *Fraud on the Market: A Criticism of Dispensing With Reliance Requirements In Certain Open Market Transaction*, 62 N.C.L. REV. 435, 458(1984)(investors can rely on complex corporate documents, or information filtered through market); Note, *The Fraud on the Market Theory: Efficient Markets and the Defenses to an Implied 10b-5 Action*, 70 IOWA L. REV. 975, 984 (1985)(average investor relies on market to interpret and convey information).

[19] *Finkel*, 817 F.2d at 359-61.

[20] 340 F.2d 457 (2d Cir. 1965).

[21] *Id.* at 463.

[22] *Id.* at 460-61. As a result of several unprofitable years, the directors of Fashion Park were forced to sell to another clothing manufacturer, or lose their labor force. *Id.* at 459-60. On November 4, 1960, the labor union informed the directors of Fashion Park of an unnamed potential buyer. *Id.* at 460. Thus, the directors adopted a resolution to sell or merge Fashion Park. *Id.* Thereafter, on November 11, 1960, the defendants, as well as another director, began purchasing shares in Fashion Park. *Id.* Then on November 14, 1960, the directors were informed that Hat Corporation of America was the interested buyer. *Id.* On November 17, 1960, the plaintiff, unaware of the imminent sale of Fashion Park, sold 5100 shares of Fashion Park to the defendants at $18.50 per share. *Id.* Subsequently, the directors entered negotiations with Hat Corporation of America which culminated in a contract to sell Fashion Park. *Id.* The contract provided that Hat Corporation of America would offer minority stockholders $50 per share. *Id.* The plaintiff

those shares at a large profit.[23] Moreover, the plaintiff asserted that the defendant's nondisclosure of material information violated section 10(b) and Rule 10b-5.[24] In contrast, the defendants maintained that Rule 10b-5 was applicable in cases of affirmative misrepresentation but not in civil suits involving mere nondisclosure.[25] The court reasoned that the exclusion of Rule 10b-5 claims involving nondisclosure would unnecessarily preclude Rule 10b-5 protection for transactions in an impersonal market.[26] Furthermore, with regard to nondisclosure actions, the court rejected the traditional standard of active reliance used in affirmative misrepresentation actions under Rule 10b-5.[27] The court reasoned that active reliance in a nondisclosure suit would require a plaintiff to consciously believe information contrary to fact.[28] Therefore, the court concluded that the proper test for reliance in a nondisclosure suit was whether the disclosure of the concealed fact would have influenced the plaintiff to act other than he did.[29] However, the court affirmed the dismissal of the plaintiff's claims on the ground that the defendant's knowledge concerning a potential buyer of Fashion Park[30] along with its purchases of the plaintiff's stock "were too remote

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based his allegation on the assertions that he was unaware of the identity of the defendants, and that the defendants purchased Fashion Park shares based on inside information defendant-director had acquired. *Id.* at 460-61.

[23] *Id.* at 460. The defendant-director sold the Fashion Park shares within two weeks of their purchase at a profit of $1 per share. *Id.* Nonetheless, plaintiff asserted his claim to recover the difference between the $18.50 per share sale price, and the $50 per share offer from Hat Corporation of America. *Id.*

[24] *Id.* at 461. In addition, the plaintiff alleged that defendants had made misrepresentations concerning the true value of Fashion Park Securities. *Id.* However, the appeals court refused to address a new claim not asserted at the trial level. *Id.*

[25] *Id.* The court reasoned that complete silence between purchasers and sellers of securities does not preclude possible violations of Rule 10b-5. *Id.*

[26] *Id.* at 462. The court noted that congressional intent, as set forth in the Securities Exchange Act § 2, 15 U.S.C. § 78(b), extended Rule 10b-5 protection to transactions in securities markets or over-the-counter markets. *List*, 340 F.2d at 462.

[27] *List*, 340 F.2d at 463.

[28] *Id.* The court noted that the requirement of active reliance in a nondisclosure suit would unduly burden plaintiffs and would not facilitate the disclosure of inside information. *Id.*

[29] *Id.* The court determined that the test would maintain the requisite elements of reliance and materiality in an action under Rule 10b-5. *Id.* The court reasoned that if the nondisclosure would have altered the investment decision, then the investor was deemed to have relied on the nondisclosure. *Id.* Furthermore, the court stated that the requirement of either proof of actual reliance, or proof of a conscious mind that believed the negative of the undisclosed information, would unduly oppress a plaintiff in a nondisclosure suit under Rule 10b-5. *Id.*

[30] *Id.* at 464. The court stated that when defendant purchased plaintiff's stocks, the

to have influenced the conduct of a reasonable investor."[31]

The United States Supreme Court in *Affiliated Ute Citizens v. United States*[32] furthered the relaxation of the stringent reliance requirements under Rule 10b-5.[33] In *Affiliated Ute*, the plaintiff's Indian tribe[34] enlisted defendants to serve as the transfer agents in the sale of shares in tribal assets.[35] The plaintiffs maintained that defendants fraudulently created a secondary market to resell shares at a higher price.[36] The Court reasoned that the fundamental purpose behind federal securities law was to facilitate a policy of full disclosure;[37] thus the Court held that, in a Rule 10b-5 nondisclosure action, reliance was implied when an investor was damaged in light of the defendant's affirmative duty as a market maker to disclose material information.[38]

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directors only knew the name of the potential buyer of Fashion Park. *Id.* In addition, the court noted that defendant's subsequent sale of Fashion Park shares at a one dollar per share profit failed to support plaintiff's assertion that defendants conspired to make a substantial profit from the sale of Fashion Park. *Id.*

[31] *Id.* In light of the potential profit for the plaintiff, the court found that the identity of the purchasers would not have influenced plaintiff's decision to sell. *Id.*

[32] 406 U.S. 128 (1972).

[33] *Id.* at 153. The Court implied reliance under §§ (a) and (c) of Rule 10b-5, and forced the defendant to prove non-reliance through the lack of a duty to disclose. *Id.* at 152-54.

[34] *Id.* at 133. The plaintiffs, mixed blood members of the Ute Indian Tribe, acquired their assets consisting of land, cash, accounts receivable, and oil, gas, and mineral rights in the partition and distribution of tribal assets between mixed bloods and full bloods. *Id.* at 133-34. Notwithstanding the other assets, the value of the land, cash, and accounts receivable was in excess of twenty million dollars. *Id.* The mixed bloods established the Ute Distribution Corporation [hereinafter UDC] to manage their assets. *Id.* at 136. The UDC was part of an overall plan to distribute the assets among individual members. *Id.*

[35] *Id.* at 145. The mixed bloods deposited all of the UDC shares in defendant bank. *Id.* The bank and the assistant managers were to facilitate and assist the mixed bloods in the sale of UDC stock. *Id.* at 146.

[36] *Id.* Between 1963 and 1964 the mixed bloods sold 1,387 shares of UDC stock at prices ranging between three-hundred and seven-hundred dollars. *Id.* at 147. However, the defendants traded UDC shares among non-Indians, maintained outstanding orders, and accepted commissions and gratuities from non-Indian purchasers of UDC stock. *Id.* at 152.

[37] *Id.* at 151. The Court rejected the philosophy of caveat emptor as repugnant to the essential goal of investor confidence in securities markets. *Id.* In addition, the Court reasoned that Rule 10b-5 could not be construed in a technical and restricted manner if it were to combat the various forms of securities fraud. *Id.*; *see* SEC v. Capital Gains Research Bureau, 375 U.S. 180, 195 (1963)(Rule 10b-5 interpreted in broad flexible manner, and not restrictively).

[38] *Affiliated Ute*, 406 U.S. at 153. The Court interpreted §§ (a) and (c) of Rule 10b-5 to prohibit a course of business, artifice, scheme or device operated to defraud a purchaser or seller of securities. *Id.* The Court noted that affirmative misrepresentations or

In the wake of *Affiliated Ute*, the Ninth Circuit decided *Blackie v. Barrack*,[39] the seminal case asserting the fraud on the market theory.[40] In *Blackie*, the plaintiff brought a nondisclosure suit under Rule 10b-5,[41] and asserted that defendant had concealed substantial losses in order to artificially inflate the price of stock in the defendant corporation.[42] The court stated that a presumption of investor reliance on the validity of stock market prices[43] was consistent with the full disclosure philosophy of the federal securities regulations.[44] Thus, the court held that the fraud on the market theory was applicable in an action under

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omissions in an action under Rule 10b-5(b) required positive proof of reliance. *Id.* However, the Court found that the inherent nature of §§ (a) and (c) could not support such a reliance requirement. *Id.* Further, the Court reasoned that defendants were market makers and not transfer agents. *Id.* at 153. Therefore, the Court found that as market makers the defendants had a duty to disclose the existence of a higher price on the secondary market. *Id.* Thus, the Court stated that plaintiffs were entitled to know of the secondary market, and that the nondisclosure of this information could have reasonably influenced their decision to sell. *Id.* at 153-54. The Court concluded that the nondisclosure of material information was equal to a scheme or act to defraud under Rule 10b-5(a) and (c). *Id.* at 153. Thus, the Court held that reliance would be implied when a material nondisclosure was accompanied by a duty to disclosure. *Id.* at 153-54. *See* Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374, 381 (2d Cir. 1974)(nondisclosure of material facts that manipulated market price of securities established causation); *see also* Simon v. Merrill Lynch, Pierce, Fenner, and Smith, Inc., 482 F.2d 880, 884 (5th Cir. 1973)(*Affiliated Ute* applied only to nondisclosure actions).

[39] 524 F.2d 891 (9th Cir. 1975).

[40] *Id.*

[41] *Id.* at 894. The plaintiffs sought class certification to represent all purchasers of stock during the 27 month period in which defendants concealed the corporation's substantial losses. *Id.* The plaintiffs alleged that over 45 documents were issued between 1970 and 1972 that omitted the true financial condition of Ampex. *Id.* at 902. The court reasoned that class certification was applicable under Rule 10b-5 when a fraudulent scheme was perpetrated on numerous investors by a series of similar misrepresentations. *Id.* at 903.

[42] *Id.* at 894. In 1970, defendant Ampex Corporation reported a $12 million profit. *Id.* Then, in August of 1972, Ampex reported a $90 million loss. *Id.* The independent auditors for Ampex withdrew their certification because of doubts that all of the $90 million loss was sustained in 1972. *Id.* The plaintiffs alleged that defendants overstated earnings, inventory, and assets, failed to improperly disclose expenses, and misrepresented prospective future earnings which artificially inflated Ampex stock. *Id.* at 902.

[43] *Id.* at 907. The court noted that investors purchase stocks for a number of reasons; however, all investors rely on the validity of the market pricing mechanism. *Id.* Further, the court found that investors do not assume the risk of a possible fraudulent scheme aimed at distorting the market price of securities. *Id.* Therefore, the court reasoned that investor confidence in the securities market coincided with the federal objective of markets free from fraud. *Id.*

[44] *Id.*; *see supra* note 14.

Rule 10b-5 based on the purchase of stock in the open market.[45] Furthermore, the court ruled that the presumption of reliance between the plaintiff and the defendant was established when the plaintiff purchased the stock at the distorted market price.[46] However, the court noted several ways in which the defendant could rebut the plaintiff's prima facie case.[47] First, the defendant could show lack of materiality, or that an insufficient number of investors relied to inflate the market.[48] Second, the defendant could prove that plaintiff would have purchased regardless of the misinformation.[49]

These defenses prevailed in *Vervaeke v. Chiles Heider & Co.*,[50] resulting in the Eighth Circuit's refusal to dispense with the requirement of direct reliance in that case. In *Vervaeke*, the defendant submitted an offering statement, but the plaintiff did not receive it until after he had purchased eight of the corporate bonds described therein.[51] The court reasoned that the plaintiff did not face any inherent evidentiary obstacles in an action for affirmative misrepresentation.[52] Thus, the court refused to extend the presumption of reliance to Rule 10b-5 actions for misrepresentation.[53] The court held that the plaintiff did not rely on the misrepresentations, and that unrelated factors motivated the plaintiff to purchase the stock.[54]

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[45] *Blackie*, 524 F.2d at 907. The court reasoned that proof of direct reliance was an unreasonable and irrelevant evidentiary burden in an action based on a scheme to inflate the price of stock in the open market. *Id.* This reasoning has been followed subsequently in other circuits. *See* Arthur Young & Company v. United States, 549 F.2d 686, 695 (9th Cir. 1977)(reliance on regulatory process established causal relationship between fraud that distorted market and investor purchase).

[46] *Blackie*, 524 F.2d at 907. The court stated that investors were defrauded regardless of whether or not they knew of any misrepresentation connected to the distorted market price of the stock. *Id. See* Ross v. A.H. Robins Co., 607 F.2d 545, 553 (2d Cir. 1979)(reliance presumed when materiality of omission or misrepresentation distorted securities market).

[47] *Blackie*, 524 F.2d at 906.

[48] *Id.* The court reasoned that materiality established causation, and that reliance was a separate element of causation. *Id.* at 906 n.22.

[49] *Id.* at 906.

[50] 578 F.2d 713 (8th Cir. 1978).

[51] *Id.* at 718. The plaintiff admitted that his broker did not provide any information concerning the corporate bonds until after the purchase. *Id.* However, the plaintiff asserted that the *Ute* presumption of reliance was applicable to the facts presented. *Id.* at 716-18. The plaintiff sought to recover the amount reflected by the bonds' subsequent decline in value. *Id.* at 715.

[52] The court reasoned that in a securities fraud action based on misrepresentation, the plaintiff encounters no special difficulty in attempting to prove reliance. *Id.* In essence, the court determined that the lack of barriers to proof permits the causation to be tested directly, thus dispensing with the need to presume reliance. *Id.*

[53] *Id.* The court rejected the plaintiff's assertion that the suit should be characterized as an action for nondisclosure under Rule 10b-5. *Id.* The court reasoned that the

Thereafter, the Fifth Circuit, in *Shores v. Sklar*,[55] adopted a different version of the fraud on the market theory. In *Shores*, the plaintiff[56] brought suit under Rule 10b-5 to recover damages for an alleged fraud perpetrated on the investment community through the issuance of worthless securities.[57] The court found that recovery under Rule

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complaint was chiefly concerned with misrepresentations contained in two documents that accompanied bond offerings. *Id.* at 717. Thus, the court held that the *Ute* presumption of reliance was inapplicable. *Id.* at 718.

[54] *Id.* at 719. The court found that the plaintiff lacked the critical element of reliance required to sustain an action for misrepresentation under Rule 10b-5. *Id.*; *see* Holmes v. Bateson, 583 F.2d 542, 559 (1st Cir. 1978)(under Rule 10b-5 actual reliance was required on misrepresentations); Fausett v. American Resources Management Corp., 542 F.Supp. 1234, 1238 (D. Utah 1982)(fraud on the market theory ia antithetical to objective of full disclosure).

[55] 647 F.2d 462 (5th Cir. 1981).

[56] *Id.* at 463. The plaintiff, Clarence E. Bishop, purchased four first mortgage revenue bonds of the Industrial Development Board of Frisco City at a total price of $4,096. *Id.* at 467. The bonds were intended to secure financing for the construction of a facility to build mobile homes in Frisco City. *Id.* at 465. The defendants, J.C. Harrelson, president of Alabama Supply and Equipment Company [hereinafter ASECo], and Clarence Hamilton, a Tennessee underwriter, concocted the industrial development scheme which produced the bonds. *Id.* ASECo was to lease the newly constucted facility and manage the manufacture of mobile homes thereon. *Id.* The lease payments were the only source of revenue to amortize the bonds. *Id.* ASECo defaulted on the lease payments shortly after the facility was completed. *Id.* at 463. The plant was sold and bond holders received $373.33 per $1,000 bond. *Id.* at 464 n.1. Plaintiff asserted that, absent the defendants' perpetration of a pervasive scheme of fraud, the bonds would not have been available on the market at any price. *Id.* at 468.

[57] *Id.* at 464. Plaintiff claimed that he was the victim of a fraudulent scheme that channeled incorrect information through the market to defraud purchasers of the instant bonds. *Id.* The court noted that Harrelson and ASECo were not financially secure. *Id.* at 465. In fact, the court found that Harrelson and Hamilton knew that ASECo lacked the proper financial resources and managerial sophistication to manufacture mobile homes. *Id.* Nonetheless, Hamilton enlisted Sklar, a Tennessee attorney, to draft the offering circular and issue an opinion on the legality of the bonds. *Id.* The gravamen of the complaint was that Sklar misrepresented or did not disclose material facts in the offering circular that would have made the bonds unmarketable. *Id.* at 465. The plaintiff asserted that Sklar omitted information concerned with the SEC investigation of the underwriter, that he portrayed ASECo as the owner of real estate assets that did not exist, and that he falsely represented Harrelson as a successful mobile home mogul. *Id.* at 466. The plaintiff further contended that current assets in ASECo were open notes from Harrelson, that ASECo was in default on a note, that ASECo had breached its obligation to maintain $400,000 in working capital, and that the ASECo financial statement was a blatant concoction of materially false and misleading information. *Id.* However, plaintiff admitted that he did not rely on the offering circular. *Id.* at 464. Nevertheless, plaintiff

10b-5 was not limited to actions that involved knowing misrepresentations or omissions.[58] Furthermore, the court reasoned that fraud on a broad scale precipitated causation that could not be found through direct reliance on fraudulent misrepresentations or omissions.[59] The court stated that a fraudulent circular was only one part of a pervasive scheme to defraud,[60] and therefore the plaintiff's non-reliance on the circular was not determinative.[61] Therefore, the court reasoned that the traditional standard of reliance was inapplicable when fraud on a broad scale funneled unmarketable securities to investors who relied on the integrity of the securities market to provide genuinely marketable securities.[62] Thus, the court held that when elaborate fraudulent schemes allowed the sale of otherwise unmarketable securities[63] the element of causation under Rule 10b-5 sections (a) and (c), but not (b), was sufficiently established if an innocent investor relied on the integ-

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maintained that his reliance on the tainted market established the requisite causation between his losses and the fraudulent scheme instigated by defendant. *Id.*

[58] *Id.* at 472. The court noted that other decisions under Rule 10b-5 extrapolated reliance from a defendant's silence in light of a duty to speak, and from a defendant's scheme that manipulated the market's pricing function. *Id.*; *see, e.g.*, *Affiliated Ute*, 406 U.S. at 153 (reliance implied from duty to speak); Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374, 381 (2d Cir. 1974)(reliance arose from scheme to manipulate market). *But see* Huddleston v. Herman & MacLean, 640 F.2d 534, 547-50 (5th Cir. 1981)(held reliance was issue in all 10b-5 cases); *Vervaecke*, 578 F.2d at 719 (reliance on offering circular required to sustain action for misrepresentation under 10b-5).

[59] *Shores*, 647 F.2d at 472. The court stated that Rule 10b-5 was promulgated to protect investors from elaborate, large scale fraud aimed at the investment community. *Id.* Therefore, the court reasoned that the search for reliance could not be limited to knowing misrepresentations or omissions. *Id.*

[60] *Id.* at 471. The court reasoned that knowledge of the offering circular would not have availed plaintiff any protection against the conspiracy to issue worthless bonds. *Id.* at 470-71.

[61] *Id.* at 469. The court found that direct reliance was required under Rule 10b-5(b), which proscribes any misstatement or omission of material fact. *Id.* at 468. Furthermore, the court reasoned that plaintiff rebutted the *Ute* presumption of reliance when he failed to read or attempt to read the offering circular. *Id.* However, the court reasoned that §§ (a) and (c) of Rule 10b-5 encompassed complex fraudulent schemes. *Id.* at 469. Thus, the court held that causation under Rule 10b-5(a) and (c) was established when the final step in a fraudulent scheme culminated in the purchase of unmarketable securities. *Id.* at 469. *See* T.J. Raney & Sons v. Fort Cobb, Oklahoma Irrigation Fuel Auth., 717 F.2d 1330, 1333 (10th Cir. 1983)(causation established by proof that securities could not have been issued but for conspiracy).

[62] *Shores*, 647 F.2d at 471.

[63] *Id.* at 470-71. The court noted that investors do not accept fraudulent marketing schemes as a cognizable investment risk. *Id.* at 469. Therefore, the court reasoned that the sacrifice of the stringent reliance requirement facilitated the federal objectives of market confidence, and the promotion of free and honest markets. *Id.* at 470.

rity of the market to vouch for the validity of the securities purchased.[64]

In *Lipton v. Documation, Inc.*,[65] the Eleventh Circuit in a comprehensive manner adopted the fraud on the market theory.[66] In *Lipton*, the defendants allegedly issued a profitable financial report when in fact the corporation had suffered serious economic misfortune.[67] The plaintiff asserted that the misinformation compromised the market's delicate pricing function and damaged investors who relied on the market price to reflect the true value.[68] The facts forced the court to choose between two inconsistent interpretations of the *Shores* opinion.[69] The defendants maintained that the *Shores* court restricted the applicability of the fraud on the market theory to schemes that introduce unmarketable securities into the open market.[70] In contrast, the plaintiffs asserted that the *Shores* court implicitly accepted the whole fraud on the market theory.[71] The court found that investors could reasonably rely on the market to efficiently interpret full and unblemished corporate disclosures.[72] Therefore, the Eleventh Circuit concluded that the fraud on the market theory was applicable in Rule 10b-5 actions when misrepresentations or omissions deceptively inflated the price of marketable securities.[73]

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[64] *Id.* In essence, the court reasoned that federal securities law entitled investors to rely on the market to the extent that the securities were marketable. *Id.*

The district court in Rose v. Arkansas Valley Envtl. & Util. Auth., 562 F.Supp. 1180, 1201 (W.D. Mo. 1983), interpreted the *Shores* decision as suggesting that there are three general elements involved in liability under the fraud or the market theory. The first element is the requirement that the security be on the market and available for purchase by the public. *Id.* Additionally, however, the security must be so lacking in basic essentials that but for the fraudulent scheme involved, it would not have been marketed at any price, i.e., it must be unmarketable. *Id.* The second element required that the security have reached the market as the result of a fraudulent scheme or plan and that the defendant actively participated in the scheme with scienter. *Id.* at 1202. The third element required the plaintiff to have relied upon the integrity of the market. *Id.* This reliance simply involves his assumption that the securities would not have been marketed unless they were entitled to be on the market. *Id.*

[65] 734 F.2d 740 (11th Cir. 1984).

[66] *Id.* at 747-48. The court reasoned that Congress did not intend to establish actual reliance as a prerequisite to recovery under Rule 10b-5. *Id.*

[67] *Id.* at 741. The plaintiffs admitted that they relied on the integrity of the market price of Documation stock and not on the misleading circular. *Id.* at 741-42. The plaintiffs sought to recoup damages sustained after the emergence of the financial muddle. *Id.* at 742.

[68] *Id.* The trial court accepted the fraud on the market theory, but also acknowledged the possibility of a restricted application under the *Shores* opinion. *Id.*

[69] *Id.* at 745. *Shores* stands as precedent, because the Eleventh Circuit adopted the precedent decisions of the Fifth Circuit rendered prior to October 1, 1981. *Id.* at 742 n.2.

[70] *Id.* at 745. The defendants asserted that the *Shores* theory only applied where the bonds were fraudulently marketed bonds. *Id.*

[71] *Id.* at 741-42.

More recently, the Third Circuit, after examining the Fifth Circuit's holding in *Shores*, adopted the fraud on the market theory in *Peil v. Speiser*.[74] The plaintiff alleged that defendant Health Chem Corporation intentionally issued misleading statements to induce investment in Health Chem stock.[75] Furthermore, the plaintiff claimed that the price of Health Chem stock induced her purchase.[76] This alleged reliance on the market price of Health Chem stock forced the court to determine the validity of the fraud on the market theory.[77] The defendant, citing *Shores*, asserted that the fraud on the market theory was not applicable to section (b) of Rule 10b-5.[78] Finding that the *Shores* prohibition was limited to actions involving the fraudulent issuance of unmarketable securities,[79] the court reasoned that the fraud on the market theory was applicable to actions involving marketable securities under Rule 10b-5(a), (b), and (c).[80] The court reasoned that investors were commensurably defrauded by misrepresentations or omissions delivered either in a face to face transaction, or by way of the open market.[81] However, the court affirmed the verdict based on the fact that the jury did not find an act, a fraudulent scheme, or a course of conduct under Rule 10b-5 that would have fraudulently induced the sale or purchase of Health Chem stock.[82]

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[72] *Id.* at 745-46. The court accepted the general applicability of the fraud on the market theory to all of the sections under Rule 10b-5 based on the heavy reliance the Fifth Circuit placed on *Blackie*, and the federal objectives of securities regulation. *Id.* The court found that the fraud on the market theory was most applicable to class actions involving misrepresentations or omissions that distorted stock prices in open markets. *Id.* at 745. In addition, the court noted the criticism levied at the fraud on the market theory when applied to underdeveloped markets or used to abolish reliance completely. *Id.* at 743.

[73] *Id.* at 747. The court distinguished *Shores* as involving newly issued securities traded on an undeveloped market. *Id.* at 745. Nevertheless, the court noted that *Shores* dictated that the Eleventh Circuit recognize the fraud on the market theory as a basis for recovery where the defendant's deception inflates open market stock prices. *Id.*

[74] 806 F.2d 1154 (3d Cir. 1986).

[75] *Id.* at 1156-57. Defendant, during the late 1970's, developed promising technology to combat the gypsy moth threat. *Id.* at 1157. The new technology attracted significant attention, which apparently drove up the price of Health Chem stock. *Id.* Plaintiff made her stock purchases during this period. *Id.*

[76] *Id.* The new technology proved ineffective, and the price of Health Chem stock dissipated. *Id.* Plaintiff alleged that defendants knew the technology was bogus. *Id.* Thus, plaintiff maintained that her $6,000 loss resulted from the perpetuation of spurious technology to inflate the price of stock in Health Chem. *Id.*

[77] *Id.* at 1156. The court noted that plaintiff's claim was based on indirect reliance. *Id.*

[78] *Id.* at 1162. The defendant maintained that particular omissions, or misrepresentations under Rule 10b-5(b) required actual reliance. *Id.*

[79] *Id.* at 1162-63. The court reasoned that a particular misrepresentation or omission would probably not result in the sale of unmarketable securities. *Id.* The court concluded, however, that the reasoning failed when applied to marketable securities traded on the open market. *Id.* at 1163. The court stated that it was reasonable for a market to respond to a single material misrepresentation. *Id.*

In the instant case, the court stated that its previous holding in *Shores v. Sklar* established the availability of the fraud on the market theory to prove reliance in an action for violation of sections (a) and (c) of Rule 10b-5.[83] The court disregarded the requirement of unmarketable securities, ruling that it was specifically tailored to the facts in *Shores*.[84] However, the court stated that, assuming the plaintiff established the materiality of defendant's misconduct, the defendant could rebut the presumption of reliance by proving that the nondisclosures did not affect the market price, that the plaintiff knew of the nondisclosures, or that the plaintiff would have purchased the securities regardless of the nondisclosures.[85] Thus, the court held that the pivotal prerequisite giving rise to the rebuttable presumption of reliance was whether the plaintiff could prove the materiality of the defendant's alleged misconduct.[86] The court stated, in dicta, that if the defendant's forced purchase of Olivetti of America inventories at inflated prices (coupled with the nondisclosure of large inventory write-downs) artificially inflated the price of shares in the defendant corporation,[87] then the materiality of the defendant's misconduct was tantamount to a nondisclosure scheme or course of business operating as a fraud under sections (a) and (c) of Rule 10b-5.[88] As a result, the plaintiff and other purchasers of stock during the period of nondisclosure were defrauded in a scheme that materially overstated the inventory of defendant corporation.[89]

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[80] *Id.* at 1156. The court refused to draw a distinction with regard to the element of reliance between misrepresentation and nondisclosure actions under Rule 10b-5. *Id.* Thus, the court held that in open and developed markets, the court will presume reliance on misrepresentations that distort the market price of securities. *Id.* at 1161.

[81] *Id.* at 1160-61. The court noted that in either case of direct or indirect reliance, the investor was fraudulently induced to purchase securities. *Id.* at 1161.

[82] *Id.* at 1163-67. The trial judge did not submit to the jury the issue of Rule 10b-5(b) liability based on the fraud on the market theory. *Id.* at 1156. However, the Third Circuit found that in response to a special interrogatory the jury found that no violations occurred to invoke Rule 10b-5. *Id.* at 1164.

[83] *Finkel*, 817 F.2d at 362-63. The court interpreted their opinion in *Shores*, and stated that the claim must arise under Rule 10b-5(a) and (c), but not (b), in order for the fraud on the market theory to apply. *Id.* at 362. The court noted that reliance is the foundation of an action involving Rule 10b-5. *Id.* However, the court stated that the fraud on the market theory created only a rebuttable presumption of reliance. *Id.* at 364. Thus, the court reasoned that the Fifth Circuit's acceptance of the rebuttable presumption of reliance under the fraud on the market theory pronounced a more appropriate evidentiary burden of reliance in actions concerning complex schemes intended to defraud purchasers of marketable securities. *Id.* at 362.

[84] *Id.* at 364. The court stated that the requirement of unmarketable securities was a rule limited to newly issued securities. *Id.*

[85] *Id.* at 364-65. The court noted that other courts which have accepted the fraud on the market theory have expressly permitted the defendant to rebut reliance. *Id.* at 359.

In *Finkel*, the Fifth Circuit extended the fraud on the market theory to marketable securities in actions under Rule 10b-5(a) and (c).[90] From a pervasive scheme of fraud that results in the issuance of unmarketable securities, the Fifth Circuit's interpretation of the fraud on the market theory has now been expanded to encompass schemes of fraud that manipulate the prices of marketable securities.[91] Unfortunately, the failure to include Rule 10b-5(b) within the applicable scope of the fraud on the market theory precludes protection for many defrauded investors who suffer an unremedied loss because they rely on a single misrepresentation.[92] The court failed to recognize that the same fraudulent purpose can be effectuated through either a fraudulent scheme or a single misrepresentation. Thus, the exclusion of Rule 10b-5(b) ignores the threat of unscrupulous corporate managers and directors who understand the market's allocation of information, and the effect and illegal rewards that can be obtained from a well conceived misrepresentation.[93]

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[86] *Id.* The court stated that another critical factor of importance was the element of an active open market. *Id.* at 363. The court reasoned that the market's pricing mechanism was the causal link between the plaintiff who relied on the market's valuation of marketable securities and the defendant's fraudulent scheme to distort the market. *Id.* at 360. Thus, material misrepresentations concerning relevant corporate information manipulate and distort the market's valuation process. *Id.*

[87] *Id.* at 363-64. These issues, if proven, will form the foundation of the requirement of materiality, and establish the causal connection between the plaintiff's purchases and defendant's misconduct. *Id.* at 363.

[88] *Id.* at 363-64. The court emphasized that the trial court must first determine that the allegation was within the purview of a nondisclosure action under §§ (a) and (c) of Rule 10b-5. *Id.* at 363.

[89] *Id.*

[90] *See supra* note 83.

[91] *See supra* notes 83 and 86.

[92] *See supra* note 61.

[93] *See supra* note 14.

Critical to the public's, as well as the market's, acquisition, interpretation, and distribution of corporate information is the role of the stockmarket analyst.[94] The cost of time and money, as well as expertise, in the analysis of corporate information economically precludes most investors from engaging in analysis themselves.[95] However, it should be noted that an analyst's job is not to find fraud, but to evaluate corporate information not yet reflected in the stock price.[96] Thus, when an analyst absorbs and disseminates misleading information, those who rely on that misleading information are defrauded.[97]Furthermore, the analyst's profit motive and basic function would negate any argument that the fraud on the market theory reduces the scrutiny given to corporate disclosures.[98] In addition, the credibility and reputation of a securities analyst who uncovered a securities fraud would be enhanced, while the credibility of a securities analyst victimized by the fraud would suffer.[99] Thus, the requirement of actual reliance placed on defrauded investors in actions under Rule 10b-5(b) serves no end other than an arbitrary limitation on liability to the class of defrauded plaintiffs.[100]

Where a corporation chooses to tamper with the price of its own securities, whether through a single misrepresentation or series of misrepresentations, that corporation should be held accountable. Given the enormity of capital, people, and transactions, the threat of corporate fraud (and conversely "strike suits") is inevitable.[101] However, a judicial overcompensation to prevent "strike suits" may encourage corporate fraud. The fraud on the market theory merely balances the scales by removing the arbitrary imbalance of actual reliance. Although vexatious suits may occur, Rule 11 sanctions should protect the efficient and well-managed corporation, while the poorly managed corporation will inevitably be purged of corrupt and incompetent officials. The market's reliability should afford protection to all investors similarly situated. The arbitrary distinction between the investor defrauded under a single misrepresentation (Rule 10b-5(b) suit), versus the investor defrauded through a fraudulent scheme (Rule 10b-5(a) and (c)) is untenable.

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[94] Gilson and Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 622-23 (1984)(efficiency paradox and need to get returns from acquisition of costly information not reflected in market).

[95] *Id.*

[96] *Id.*

[97] *See supra* note 39.

[98] *See* Dirks v. SEC, 103 S.Ct. 3255, 3258 (1983)(analyst investigated fraudulently run corporation).

[99] *Id.*

[100] *See supra* notes 16 and 17; *cf.* Lavoie, F*raud on the Market*, 20 REV. SEC. & COMM. REG. 139 (1987) (fraud on the market frustrates objectives of 1934 Act).

[101] *See supra* note 16.

Tracy L. Oakley

AUTHOR'S NOTE: Recently, in *Basic Inc. v. Levinson*, 108 S.Ct. 978 (1988), the United States Supreme Court addressed the question of reliance under Rule 10b-5 and the fraud on the market theory. The Court prefaced their discussion of the theory with the statement that their "task was not to assess the general validity of the theory, but to consider whether it was proper for the courts below to apply a rebuttable presumption of reliance, supported in part by the fraud on the market theory." *Id.* at 215. Thereafter, the Court, without adopting the fraud on the market theory, held that "it was not inappropriate to apply a presumption of reliance supported by the fraud on the market theory." *Id.* at 220.

CONSTITUTIONAL LAW — FIFTH AMENDMENT — THE SOLE SHAREHOLDER PRESIDENT OF A CORPORATION IS NOT ENTITLED TO AN ACT-OF-PRODUCTION PRIVILEGE WITH REGARD TO CORPORATE DOCUMENTS

Appellant[1] was subpoenaed to produce corporate records by a federal grand jury[2] in the United States District Court for the Southern District of Mississippi.[3] The District Court denied the subsequent motion of the appellant to quash the subpoena[4] and ordered production of the documents.[5] Appellant refused to obey the order because the production of the corporate documents would be self-incriminating and argued that his one-man corporations were not collective entities.[6]

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[1] Appellant was president and sole-shareholder of two corporations incorporated in the state of Mississippi. *In re* Grand Jury Proceedings (Doe), 814 F.2d 190, 191 (5th Cir. 1987)(per curiam), *aff'd sub nom.* Braswell v. United States, 108 S.Ct. 2284 (1988). Appellant incorporated the first corporation in 1980 and the second corporation in 1981. *Id.* Appellant retained ownership of 100% of the stock of both corporations. *Id.* Pursuant to a Mississippi law that required a corporation to have at least three directors, the appellant, his wife, and his mother were directors for both corporations. *Id.*; *see* MISS. CODE ANN. § 79-3-69 (1972), *repealed by* Laws, 1987, ch. 486, § 17.06 (current version at MISS. CODE ANN. § 79-4-8.03)(corporations incorporated in Mississippi previously were required to have at least three directors; current law requires only one).

[2] *In re Grand Jury Proceedings (Doe)*, 814 F.2d at 191. Appellant was not required to testify or appear before the grand jury if the subpoenaed documents were delivered to the agent who served the subpoena. *Id.* at 191-92. The subpoena ordered production of specific corporate records and tax documents for the years 1982 through 1985. *Id.* at 191 n.1.

[3] *Id.* at 190.

[4] *Id.* at 192. The trial court noted that although the appellant was doing business through the corporate name, the corporations were operated as if they were sole proprietorships. *Id.*

[5] *Id.*

[6] *Id.* Appellant argued that his one-man corporations were not collective entities with independent identities apart from their individual members. *Id.* The fifth amendment privilege against compulsory self-incrimination was designed to protect an individual from compelled production of his personal papers and effects. Bellis v. United States, 417 U.S. 85, 87 (1974). However, the *Bellis* Court held that an individual acting in a representative capacity could not rely upon this privilege to avoid producing the records of a collective entity even if the records could incriminate him personally. *Id.* at 90. According to the *Bellis* Court, the "collective entity" doctrine encompasses corporations, labor unions, or any organization in which an individual serves as the representative of a collective group. *Id.* at 91. Thus, the *Bellis* Court concluded that corporations were considered corporate entities, regardless of their size. *Id.* at 100.

Thereafter, the district court adjudged the appellant to be in contempt of court.[7] On appeal,[8] the United States Court of Appeals for the Fifth Circuit, *held*, affirmed. Where the president and sole shareholder of a corporation acted as custodian of corporate records which were subpoenaed by a federal grand jury, the fifth amendment afforded no act-of-production privilege for the documents, regardless of the size of the corporation or the purpose of its formation. *In re Grand Jury Proceedings (Doe)*, 814 F.2d 190 (5th Cir. 1987)(per curiam).

The application of the fifth amendment to documentary subpoenas has been a focal point of numerous judicial opinions and legal articles throughout this century.[9] The United States Supreme Court first applied the fifth amendment[10] to a court-ordered production requirement[11] in *Boyd v. United States*.[12] In *Boyd*, a district judge ordered a contractor[13] to produce an invoice[14] and upon compliance, entered a forfeiture and seizure judgment against the contractor.[15] In a landmark decision, the Supreme Court reversed the district court judgment and held that the compulsory production of "private papers" from a businessman was unconstitutional.[16] However, the *Boyd* Court did not consider whether business organizations, including corporations, could invoke the fifth amendment privilege with respect to business documents.[17]

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[7] *In re Grand Jury Proceedings (Doe)*, 814 F.2d at 192. The District Court stayed the commitment of the appellant to the United States Marshall pending the expedited appeal. *Id. See generally* 28 U.S.C. § 1826(a) (Supp. 1987)(providing judicial penalty for recalcitrant witnesses who refuse to comply with court orders); 28 U.S.C. § 1826(a)(Supp. 1987)(appeal must be disposed of as soon as practicable for contempt citation).

[8] *In re Grand Jury Proceedings (Doe)*, 814 F.2d at 192. On appeal, the appellant argued that both corporations existed only for their appearance and did nothing to change the manner in which he conducted his private business. *Id.* Therefore, the appellant asserted that the corporations were identical to sole proprietorships. *Id.* In support of this assertion, appellant argued that neither his wife nor his mother had any authority to act on behalf of the corporation and that he individually controlled each corporation as if he were an individual proprietor. *Id.* at 191. In the alternative, appellant argued that some of the subpoenaed corporate documents were "private writings" and therefore should have been protected by the fifth amendment privilege. *Id.* However, the Fifth Circuit refused to address the "private writings" issue since it was not raised before the district court prior to appeal. *Id.* at 193.

[9] *See generally* Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 VA. L. REV. 869, 870-74 (1985)(discussion of Burger Court's efforts to decrease protection for private papers); Note, *The Life and Times of Boyd v. United States (1886-1976)*, 76 MICH. L. REV. 184 (1977)(identifying trends which led to eventual demise of *Boyd*).

[10] U.S. CONST. amend. V. The fifth amendment provides that "no person . . . shall be compelled in any criminal case to be a witness against himself." *Id.*

[11] The most common method of ordering the production of documents is the subpoena duces tecum which commands the person who has control or possession of the documents to present them to the court. BLACK'S LAW DICTIONARY 1279 (5th ed. 1979); *see also* FED. R. CIV. P. 45 (b) (subpoena for production of documentary evidence); FED. R. CRIM. P. 17(c)(same).

[12] 116 U.S. 616 (1886).

[13] *Id.* at 618. The defendant contractor, E. A. Boyd & Sons, had contracted to supply glass for a federal building under construction. *Id.*

[14] *Id.* at 618. In order to prosecute the charge of fraudulently importing goods without paying duties upon the merchandise, it was necessary to show the quantity and value

Twenty-three years later in *Hale v. Henkel*,[18] the Court limited the rule enunciated in *Boyd* by holding that the privilege against documentary production could not be asserted by a corporation.[19] In estab-

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of glass contained in the twenty-nine cases. *Id.* at 618. Thus, the district attorney brought a motion before the court to require production of the invoice. *Id.* The invoice from Union Plate Glass Company described twenty-nine cases of plate glass imported from Liverpool, England, into the port of New York. *Id.* at 619. The invoice was filed by the defendant with the collector of customs of the port on April 7, 1884. *Id.*

[15] *Id.* at 618. The trial court utilized the power vested by section five of the Act of June 22, 1874, entitled "An Act to Amend the Customs-Revenue Laws and to Repeal Moieties." *Id.* at 619. *See generally* Alito, *Documents and the Privilege Against Self-Incrimination*, 48 U. Pitt. L. Rev. 27, 31 & nn. 7-8, 32 & nn.12, 14-16 (1986)(tracing legislative history of original act).

[16] *Boyd*, 116 U.S. at 638. The Court ruled that the seizure of the invoice and its subsequent introduction at trial violated the reasonableness clause of the fourth amendment and the self-incrimination clause of the fifth amendment. *Id.* at 634-35. In delivering the opinion of the Court, Justice Bradley extensively quoted Lord Camden's opinion in Entick v. Carrington, 19 Howell's St. Trials 1029 (C.P. 1765), remarking that "papers are the owner's goods and chattels; they are his dearest property . . . ." *Boyd*, 116 U.S. at 627-28 (quoting *Entick*). *See generally* Gerstein, *The Demise of Boyd: Self-Incrimination and Private Papers in the Burger Court*, 27 U.C.L.A. L. Rev. 343, 356-62 (1979)(providing history of common law protection against compelled production of documents prior to *Boyd* case).

[17] The Court used the term "private" in describing the requested papers even though the invoice subpoenaed was from a glass company. *Id.* at 622. However, there was no recognition of a dichotomy between personal and business documents. *See* Note, *Business Records and the Fifth Amendment Right Against Self-Incrimination*, 38 Ohio St. L.J. 351, 352 (1977)(English common law failed to recognize dichotomy of personal and business documents).

[18] 201 U.S. 43 (1906).

[19] *Id.* at 70. Hale, secretary and treasurer of a corporation, received a subpoena duces tecum commanding him to produce corporate documents for a grand jury investigation of several Sherman Act violations. *Id.* at 44-46. Although the Assistant District Attorney offered and assured Hale immunity from self-incrimination, Hale declined to produce the documents, and the court found him in contempt. Id. at 46.

For examples of how immunity statutes have been upheld against fifth amendment attacks, see Kastigar v. United States, 406 U.S. 441, 453 (1972)(holding that such immunity from use and derivative use was coextensive with scope of privilege against self-incrimination, and therefore was sufficient to compel testimony over claim of privilege); Brown v. Walker, 161 U.S. 591, 610 (1896)(holding that objective of fifth amendment was lishing the artificial entities exception,[20] the Court noted that obstruction of government access to corporate records would inhibit prosecution of corporate criminal activity.[21] The *Hale* Court reasoned that since a corporation was a creature of the state,[22] it was subject to the visitatorial powers of the state.[23] However, the Court avoided the question of whether an officer of a corporation could decline to produce

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fully accomplished by statutory immunity). For the current statutory provision for individual immunity when providing information to a grand jury, see 18 U.S.C. § 6003 (1985)(individual granted statutory immunity when providing information for federal grand jury).

In a companion case to *Hale*, the Court held that the immunity provided by the fifth amendment against self-incrimination was personal to the witness, and that he could not assert the privilege of another person or of a corporation in refusing to obey a court order. McAlister v. Henkel, 201 U.S. 90, 91 (1906). *See generally* C. MCCORMICK, MCCORMICK ON EVIDENCE § 128-29 (3d ed. 1984 & Supp. 1987)(discussing privilege as related to corporations, associations, and their agents).

[20] *Hale*, 201 U.S. at 74. The Court reasoned that there was a clear distinction between an individual and a corporation. *Id.* Since the corporations were artificial creations of the state, the *Hale* Court maintained that they were not entitled to the fifth amendment rights enjoyed by natural persons. *Id.* at 69-70; *see* H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES 15, 125-27, 149-52 (3d ed. 1983)(discussing concept of corporations as artificial persons). *But see Hale*, 201 U.S. at 83-89 (Brewer, J., dissenting)(Congress should not be given power to strip corporation of fifth amendment protection since corporations are made up of individual persons); Providence Bank v. Billings, 29 U.S. (4 Pet.) 514, 562 (1830)(Chief Justice Marshall noted that object of incorporation was to bestow character and properties of individuality on collective and changing bodies of men). *See generally* Meltzer, *Required Records, The McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. CHI. L. REV. 687, 701-03 (1951)(advancing argument that corporations should be granted fifth amendment rights).

[21] *Hale*, 201 U.S. at 74. The Court noted that corporations were a necessary feature of modern business activity and that their aggregated capital was the source of the majority of great enterprises. *Id.* at 76; *see* Comment, *Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1229 (1979)(twentieth century has witnessed tremendous explosion in number and size of corporations which has greatly influenced social and political activity and increased need for regulatory functions).

[22] *Hale*, 201 U.S. at 74. The Court reasoned that a corporation was an association of individuals, chartered under the laws of a state and operating under an assumed name. *Id.* at 76. Thus the corporation can be viewed as a creation of the state that issued the charter. *Id.* at 75-76. Justice Harlan, in a concurring opinion, stated that a corporation was an "artificial being, invisible, intangible, and existing only in contemplation of law". *Hale*, 201 U.S. at 78 (Harlan, J., concurring).

[23] *Id.* at 75. The Court noted that states had the power to investigate corporate records to determine if certain corporations were abusing their powers. *Id.* However, when viewed in the context of the state-corporate relationship, the Court had to justify visitatorial powers held by the federal government as well. *Id.* The Court dispensed with this problem by maintaining that corporations were subject to dual sovereignty and the congressional power to regulate commerce. *Id.* at 77.

corporate documents in response to a subpoena duces tecum where the documents or the production thereof could personally incriminate the officer.[24]

The Court explored that question in *Wilson v. United States*,[25] wherein the Court ruled that a corporate officer could not refuse to produce corporate documents, even if the documents would incriminate the officer.[26] In *Wilson*, the corporate president had already been indicted by a grand jury when the corporation was issued a subpoena to produce copies of letters and telegrams signed by its president.[27] The president refused to produce the documents on the ground that they would incriminate him personally; and upon his refusal, the trial court found him in contempt of court.[28] In rejecting the fifth amendment argument of the defendant, the Court again asserted the artificial entities exception, utilizing waiver and property rationales to support its conclusion.[29] The Court reasoned that by accepting a corporate position, a person was deemed to have knowledge of the corporate duty to produce documents upon demand.[30] The Court concluded that a corporate officer had waived his personal fifth amendment privilege against self-incrimination.[31] Moreover, the Court decided that the documents were not the "private papers"[32] of the corporate president, but rather those of the corporation itself.[33] According to the Court, the corporate officer merely held the papers as a custodian in a representative capacity.[34]

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[24] It was not necessary for the *Hale* Court to decide the issue of personal incrimination since Hale had been granted immunity from suit. *Id.* at 76; *see supra* note 19 and accompanying text.

[25] 221 U.S. 361 (1911).

[26] *Id.* at 383. The Court reiterated its earlier decision in *Hale*, stating that where a corporation was engaged in activities within the congressional domain, the corporation was subject to the visitatorial powers of the chartering state as well as the dual sovereignty of the national government. *Id.* at 383-84. *But see* Clapp, *Privilege Against Self-Incrimination*, 10 Rutgers L. Rev. 541, 565 & n.106 (1956)(expressing doubt that constitutional privilege could be denied as safeguard affecting recognized governmental procedures). The Court later maintained that the procedures available to the federal government were different from the power of state government to inspect. Federal Trade Comm'n v. American Tobacco Co., 264 U.S. 298, 306 (1924).

[27] *Wilson*, 221 U.S at 367-68. The corporate president had previously been indicted for fraudulent use of the mails and conspiracy. *Id.* at 367.

[28] *Id.* at 369. The president argued that he should not be held in contempt since the subpoena was directed to the corporation rather than to him individually. *Id.* at 370.

[29] *Id.* at 374-79. This case also gave rise to the "required records" doctrine, which denies the privilege against self-incrimination with respect to records required by law to be kept by the artificial entity. *Id.* at 380. The Court reasoned that corporate records which were required to be kept by the laws of the chartering state were not private papers and therefore were not protected by the privilege. *Id. See generally* 8 J. Wigmore, Evidence § 2259c (J. McNaugton rev. ed. 1961 & Supp. 1986)(exhaustive discussion of application of required records doctrine to artificial and collective entities); Mosteller, *Simplifying Subpoena Law: Taking the Fifth Amendment Seriously*, 73 Va. L. Rev. 1, 62-74 (1987) (discussion in detail of required records exception and its application in modern court system).

[30] *Wilson*, 221 U.S. at 380-82.

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[31] *Id.* Many modern courts continue to use the waiver theory to justify the denial of a fifth amendment privilege to an artificial entity. *See, e.g., In re* Grand Jury Subpoena Duces Tecum (Underhill), 781 F.2d 64, 70 (6th Cir.)(waiver doctrine justified "required records" exception), *cert. denied*, 107 S. Ct. 64 (1986); *In re* Two Grand Jury Subpoena Duces Tecum, 769 F.2d 52, 59 (2d Cir. 1985)(since corporate officer enjoys corporate benefits, he cannot disregard corporate form in order to shield its business records from production); *In re* Grand Jury Matter (Brown), 768 F.2d 525, 537 (3d Cir. 1985)(en banc)(Garth, J., dissenting)(collective entity doctrine based on theory that custodian waived his personal fifth amendment right upon accepting corporate office); *see also* Note, *Fifth Amendment Privilege and Compelled Production of Corporate Papers after Fisher and Doe*, 54 FORDHAM L. REV. 935, 949-59 (1986)(exploring argument that implied waiver rationale was valid and justified by need to regulate corporate activity); Note, *Testimonial Waiver of the Privilege Against Self-Incrimination*, 92 HARV. L. REV. 1752, 1760, 1761 & n.52 (1979)(Court has balanced interest in truth-finding against interests underlying fifth amendment privilege in cases involving testimonial waiver and required records). *But see* Mosteller, *supra* note 29, at 59-61 (waiver rationale was nothing more than rhetorical device used to justify denying privilege to corporate officers on basis of public necessity).

[32] *Wilson*, 221 U.S. at 380. The Court distinguished between the "private papers" in the *Boyd* case and the public papers of a corporate entity. *Id.* The Court also applied the principle to corporate records required by the chartering state. Id. at 382. *See supra* note 29 and accompanying text.

[33] *Wilson*, 221 U.S. at 380. In a companion case, the Court ruled that a corporate officer was merely a custodian of the books and records of someone else and could assert no privilege even though the contents of the books tended to incriminate him. Dreier v. United States, 221 U.S. 394, 400 (1911); *see also* United States v. Lawn, 115 F. Supp. 674, 676 (S.D.N.Y. 1953)(no privacy privilege attaches to corporate records). *See generally* 28 U.S.C.A. § 1732 nn.51-54 (West Supp. 1987)(complete compilation of records regarded as corporate documents rather than private documents of individual).

[34] *Wilson*, 221 U.S. at 380. Two years later, the Court extended the impact of *Wilson* in Grant v. United States, 227 U.S. 74 (1913). While *Wilson* involved a large corporation, the corporation in *Grant* had only one stockholder. *Grant* at 227 U.S. at 77. In *Grant*, the Court upheld a contempt charge against an attorney who refused to obey a subpoena directing him to produce the records of a "one-man" corporation that he had dissolved. *Id.* at 78. The Court reasoned that the documents in the possession of the attorney were independent documents, and thus they were not privileged even though they had been received for consultation purposes. *Id.* at 79. The Court further noted that the essential character of the documents had not changed. *Id.* at 80. Instead, the documents remained subject to inspection and examination when required by competent authority. *Id.*; *see* Reamer v. Beall, 506 F.2d 1345, 1346 (4th Cir. 1974)(no privilege for production of documents for sole stockholder and sole professional employee of corporation as custodian of records), *cert. denied*, 95 S. Ct. 1338 (1975); Fineberg v. United

In the landmark decision of *United States v. White*,[35] the Supreme Court extended the decisions of *Hale* and *Wilson* from the corporate sphere to that of the unincorporated association.[36] In a unanimous reversal of the lower court's decision,[37] the Supreme Court held a union president in contempt for failure to respond to a documentary subpoena[38] and with its decision established the collective entity exception.[39] In justifying its decision, the Court explained that a union, as a collective entity, had similar characteristics to that of a corporation.[40] Accordingly, an increasingly large sphere of business activity by

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States, 393 F.2d 417, 420 (9th Cir. 1965)(sole owner or officer of corporation could not claim privilege of fifth amendment in connection with corporate books and records either for himself or corporation). *See generally* Note, *supra* note 17, at 354-55 (incorporated sole proprietorship must forego fifth amendment document production privilege as part of cost of incorporation).

[35] 322 U.S. 694 (1944).

[36] *White*, 322 U.S. at 701. In *White*, the president of a local union was issued a subpoena duces tecum to produce union records. *Id.* at 695. The union president refused to produce the demanded documents on grounds that they might incriminate the local union, the international union, himself as an officer of the union, or himself individually. *Id.* at 696.

[37] *Id.* at 705. The lower court ruled that the union was not subject to the visitatorial powers of the state and that the personal claim of the custodian under the fifth amendment was valid. United States v. White, 137 F.2d 24, 26 (3d Cir. 1943).

[38] *White*, 322 U.S. at 705. The subpoena in question requested eleven items, including a copy of the local union's constitution and the minutes of its meetings. White v. United States, 137 F.2d 24, 25 n.1 (3d Cir. 1943).

[39] *White*, 322 U.S. at 699. The Court provided that in order for the papers to be protected, they must be the private property of the person claiming the privilege or be in his possession in a purely personal capacity. *Id.* The Court based this conclusion on the fact that the privilege against self-incrimination was a purely personal one. *Id.* Moreover, if the records and documents were held in a representative capacity, the privilege would not exist. *Id.*; *see* Rogers v. United States, 340 U.S. 367, 371 (1951)(treasurer of Communist Party of Denver found in contempt for not producing party records because privilege against self-incrimination was purely personal to and solely for benefit of witness); Application of Patterson, 125 F. Supp. 881, 883 (S.D. N.Y. 1954)(secretary of Civil Rights Congress not entitled to fifth amendment privilege because he held documents in representative capacity, and privilege was purely personal in nature), *rev'd on other grounds sub nom.* United States v. Patterson, 219 F.2d 659 (2d Cir. 1955); Albertson v. Millard, 106 F. Supp. 635, 644 (E.D. Mich. 1952)(secretary of Communist Party of Michigan could not assert privilege because he held records in representative and not personal capacity), *rev'd on other grounds*, 345 U.S. 242 (1953); *see also* Note, *Books and Records and the Privilege Against Self-Incrimination*, 33 BROOKLYN L. REV. 70, 82-85 (1967)(records of unincorporated associations no longer protected by fifth amendment privilege).

[40] *White*, 322 U.S. at 701. The Court in *White* itemized the factors which made a union appear to be a separate legal entity: the union's existence was perpetual and not dependent on the life of any member; the union operated under its own constitution and

unincorporated entities justified the need for effective law enforcement.[41] This decision substantially expanded the *Hale* exception to include all "organized institutional activity,"[42] and made it clear that, like corporations,[43] unincorporated associations did not embody the

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engaged in a multitude of business acts which clearly were not the private undertakings of its members; unions enjoy numerous substantive rights based upon their status as separate functioning structures. *Id.* at 701-03. The Court then set forth the test for determining whether or not an organization could invoke the privilege against self-incrimination:

> [w]hether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. If so, the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity.

Id. at 701. The Supreme Court dealt with four more cases involving unincorporated associations whose officers attempted to assert a fifth amendment privilege against document production. *See* McPhaul v. United States, 364 U.S. 372, 380 (1960)(Civil Rights Congress); Curcio v. United States, 354 U.S. 118, 119 (1957)(local labor union); Rogers v. United States, 340 U.S. 367, 371-72 (1951)(Communist Party of Denver); United States v. Fleischman, 339 U.S. 349, 357-58 (1950)(Joint Anti-Fascist Refugee Committee).

However, in subsequent decisions, the Court failed to apply the test formulated in *White* and merely assumed in each case that an individual acted in a representative capacity when he held the records of an unincorporated entity. *See* Note, *Derogation of Fifth Amendment as it Pertains to Documents of Organized Entities*, 3 HOFSTRA L. REV. 467, 477-78 (1975)(Court after *White* replaced test with mechanical application of case law and held that since unincorporated associations did not embody personal interests of their constituents, officers could not invoke privilege with regard to documents of association).

[41] *White*, 322 U.S. at 700-01. The Court reasoned that the denial of protection to the individual was based on the public necessity of enforcing the laws against powerful economic organizations. *Id.*

[42] *Id.* at 701; *see supra* note 40 (collective entity included any organization with distinct and separate identity apart from individuals who constitute it).

[43] *White*, 322 U.S. at 705. The question of whether or not the *White* test applied to corporations was decided in the case of *In re* Greenspan, 187 F. Supp. 177 (S.D.N.Y. 1960). There, the Internal Revenue Service subpoenaed records of a corporation which had only one stockholder. *Id.* at 178. Respondent argued that the test should be whether or not the corporation embodied and represented the purely personal and private interests of the individual. *Id.* However, the Court rejected the argument, distinguished the *White* case, and simply utilized the act of incorporation in order to deny the privilege. *Id.* at 179. Conversely, in Application of Daniels, 140 F. Supp. 322, 323 (S.D.N.Y. 1956), the prosecutor tried to subpoena records of a Panamanian Corporation which had never done business in this country and whose president was the sole stockholder. Thus, the Court could not utilize the *Wilson* precedent of visitatorial powers since the corporation was not doing business in this country. *Id.* at 324. Therefore, the Court ruled that since the respondent was holding the books in a personal capacity, he was entitled to claim the privilege. *Id.* at 328.

personal interests of their constituents.[44] Therefore, the Court held that a member of an unincorporated association was not entitled to invoke the privilege with respect to association documents.[45]

The Supreme Court further limited the scope of the fifth amendment privilege in *Bellis v. United States*.[46] In *Bellis*, the Court held that the collective entity rule precluded a partner from asserting his fifth amendment privilege to resist compelled production of partnership records.[47] The Court reasoned that a partnership resembled a corporation or labor union in that a partnership was a well-organized, structured entity with an established identity independent of its individual members.[48] In its decision, the Court developed a "bright line" test between the unprivileged documents belonging to an organization and the privileged documents belonging to an individual.[49]

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[44] *White*, 322 U.S. at 705.

[45] *Id.* Subsequent to its decision in *White*, the Court formulated the "Required Records Doctrine." Shapiro v. United States, 335 U.S. 1, 17 (1948). The *Shapiro* Court ruled that any records required to be kept by law or agency regulation would not fall under the fifth amendment privilege. *Shapiro*, 355 U.S. at 17. This doctrine was extended in Couch v. United States, 409 U.S. 322, 355 (1973), to require an accountant to produce tax documents of a client for an Internal Revenue Service summons. *See generally* Saltzburg, *The Required Records Doctrine: Its Lessons for the Privilege Against Self-Incrimination*, 53 U. Chi. L. Rev. 6 (1986)(exhaustive review of origin and subsequent legal history of "Required Records Doctrine").

[46] 417 U.S. 85 (1974).

[47] *Id.* at 101. Justice Marshall developed a broad justification for denial of the fifth amendment protection to documents held by representatives of a collective entity. *Id.* at 92. He noted that the custodian lacked the control over the documents' content and location and "[t]he right to keep them from the view of others which would be characteristic of a claim of privacy and confidentiality." *Id.* The *Bellis* Court stated that it was not important that partnerships were not legal entities in all respects, so long as there were enough indicia of a legal entity for fifth amendment purposes. *Id.* at 97 n.7; *see also In re* Grand Jury Subpoena Duces Tecum, 358 F. Supp. 661, 668 (D. Md. 1973)(Court looked to Uniform Partnership Act in determining records belonging to partnership were possessed in purely representative capacity). *See generally* Note, *Bellis v. United States: Denial of Fifth Amendment Protection to Partnerships*, 39 Alb. L. Rev. 545 (1975)(general discussion of partnerships, Uniform Partnership Act and application of *Bellis* to deny fifth amendment production privilege).

[48] *Bellis*, 417 U.S. at 93. The Court made reference to Wall Street law firms and stock brokerage firms to exemplify that some of the most powerful private institutions in the nation were conducted in the partnership form. *Id.* The Court further explained that to qualify as an organizational document for fifth amendment purposes, the document must belong to an organization that maintained a distinct set of organizational records and recognized in its members a right of control and access to them. *Id.* However, distinguishing between individual and organizational records could be problematic. *See* Note, *On Claiming the Fifth Amendment for Mixed Purpose Documents: The Problem of Categorizing Documents as Personal or Corporate in a Business Setting*, 17 U.S.F. L. Rev. 333, 348-53 (1983)(discussion of common threads and unresolved issues in distinguishing documents for privilege purposes); *cf. In re* Grand Jury Subpoena Duces Tecum Dated April 28, 1981, 657 F.2d 5, 8 (2d Cir. 1981)(listing factors affecting possession,

Two years after *Bellis*, the Supreme Court in *Fisher v. United States*[50] introduced a new qualification that further limited the application of the fifth amendment privilege.[51] The *Fisher* Court upheld subpoenas directing taxpayers' attorneys[52] to produce work papers prepared by the taxpayers' accountants for income tax purposes.[53] The

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custody and control issue pertaining to privilege or non-privilege of documents).

[49] *In re* Two Grand Jury Subpoena Duces Tecum, 769 F.2d 52, 58-59 (2d Cir. 1985)(*Bellis* insisted on drawing bright line between organizations which have recognizable, juridical existence apart from their members, such as corporations and partnerships, and those which do not). *See generally* Note, *supra* note 40 at 481-83 (test used was whether group was relatively well-organized and structured, or merely loose, informal association of individuals that did not keep distinct organizational records).

[50] 425 U.S. 391 (1976).

[51] *Id.* at 394-96. The *Fisher* Court ruled that there must be a substantial threat of self-incrimination before the privilege could be invoked. *Id.* at 413. In setting a new system for evaluating documentary subpoenas, the Court in *Fisher* also rejected the privacy rationale for the fifth amendment. *Id.* at 399-401. The Court explained:

> Within the limits imposed by the language of the Fifth Amendment, . . . the privilege truly serves privacy interests; but the Court has never on any ground, personal privacy included, applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence which, in the Court's view, did not involve compelled testimonial self-incrimination of some sort.

Id. at 399. The Court continued:

> We cannot cut the Fifth Amendment completely loose from the moorings of its language, and make it serve as a general protector of privacy—a word not mentioned in its text and a concept directly addressed in the Fourth Amendment. We adhere to the view that the Fifth Amendment protects against 'compelled self-incrimination, not [the disclosure of] private information.'

Id. at 401 (quoting United States v. Nobles, 422 U.S. 225, 233 n.7 (1975)).

[52] *Fisher*, 425 U.S. at 396. The summonses were addressed to the taxpayers' attorneys, to whom the taxpayers had delivered the documents. *Id.* In reaching its conclusion, the Court considered the question of whether the fifth amendment would have protected the taxpayers, based on the attorney-client privilege, had they not turned the records over to their attorneys. *Id.* at 402.

[53] *Id.* at 409. The *Fisher* Court made a comparison to Couch v. United States, 409 U.S. 322, 324 (1973). *Fisher*, 425 U.S. at 396-98. In *Couch*, a taxpayer arranged for records to be transferred from his accountant to his attorney after a summons was served on the accountant. *Couch*, 409 U.S. at 324. The Court held that the fifth amendment privilege of a taxpayer did not protect the records in the hands of the accountant. *Id.* at 329-36. The only difference in *Fisher* was that the taxpayers managed to transfer the documents from their accountants to their attorneys before the summonses were issued. *Fisher*, 425 U.S. at 394; *see* Sale v. United States, 228 F.2d 682, 686 (8th Cir.)(there was no attorney-client privilege for preexisting documents; attorney-client privilege does not extend to papers prepared by accountant prior to commencement of attorney-client relationship), *cert. denied*, 350 U.S. 1006 (1956). *See generally* Comment, *The Protection of*

Court reasoned that a summons directing a third party to surrender the defendant's papers would not violate the fifth amendment because it did not constitute personal compulsion against the accused.[54] The Court noted that in some circumstances the act of producing a document pursuant to a subpoena may be considered the equivalent of testimony,[55] either because the act conceded the existence of papers demanded and their possession or control by the owner, or because it would serve to authenticate them. However, in developing[56] the act-of-production theory[57] the *Fisher* Court determined that the protection of

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Privacy by the Privilege Against Self-Incrimination: A Doctrine Laid to Rest?, 59 Iowa L. Rev. 1336, 1341 n.29 (1974) (attorney-client privilege applied only to information that originated within attorney-client relationship). *But see* Note, *The Attorney and His Client's Privileges*, 74 Yale L.J. 539, 546-52 (1965) (argument in favor of extending attorney-client privilege to preexisting documents).

[54] *Fisher*, 425 U.S. at 409. The Court thought the subpoena would have been valid even if directed at the taxpayers themselves. *Id.* The Court agreed that a subpoena served on a taxpayer requiring him to produce work papers of an accountant involved substantial compulsion. *Id.* However, it did not compel oral testimony; nor would it ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought. *Id. See generally* Note, *Pre-Summons Transfer of Accountant Work Papers to Attorney: Effect on Taxpayer's Privilege Against Self-Incrimination*, 55 B.U.L. Rev. 418 (1975)(exhaustive review of case history relating to Section 7602 of Internal Revenue Code, which empowered Internal Revenue Service to issue summons requiring any person who had custody of records relevant to tax inquiry to produce them).

[55] *Fisher*, 425 U.S. at 410. However, in *Fisher*, the Court stated that it was not necessary to determine whether the fifth amendment would shield the taxpayer from producing his own tax records because the papers demanded were not his "private papers" as was the case in *Boyd*. *Id.* at 414.

[56] *Id.* at 410. The *Fisher* Court said that compliance with the subpoena would tacitly concede the existence of the papers demanded and their possession or control by the taxpayer. *Id.* It would also indicate the taxpayer's belief that the papers were those described in the subpoena. *Id.*; *see* Heidt, *The Fifth Amendment Privilege and Documents — Cutting Fisher's Tangled Line*, 49 Mo. L. Rev. 439, 471-72 & n.136 (1984)(compelling submission of records written by taxpayer would clearly authenticate records).

[57] *Fisher*, 425 U.S. at 410. In *Fisher*, the Court explained that although the act of producing the work papers of the accountant required the taxpayer to implicitly admit the existence and possession of the documents, the production of the documents did not rise to the level of testimony protected by the fifth amendment. *Id.* at 411. The Court reasoned that because the work papers were prepared by the accountant in the ordinary course of business and because their existence and location were not in question, admitting the existence or possession of the documents did not require the taxpayer to provide the government with testimonial evidence. *Id.* Thus, the Court concluded that the communication involved in production was not significant. *Id.* at 412; *see In re* Grand Jury Subpoena of Fred R. Witte Center Glass No. 3, 544 F.2d 1026, 1029 (9th Cir. 1976)(Kennedy J., concurring)(*Fisher* concerned working papers of accountant, and testimonial assertion implied in their production was *de minimis*); *see also* United States v. Schlansky, 709 F.2d 1079, 1081 (6th Cir. 1983)(where prosecution described third-party records with

the fifth amendment was applicable only when a person was compelled[58] to make a testimonial communication[59] that was incriminating.[60] The Court reasoned that implied admissions were testimonial in nature and were regarded as compelled whenever the submission of documents was compelled.[61] However, the *Fisher* Court expressly left

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objective precision, using information apparently provided by those who had prepared them, production required no meaningful testimonial act by defendant), *cert. denied*, 465 U.S. 1099 (1984).

[58] *Fisher*, 425 U.S. at 396. The *Fisher* Court noted that compelled testimonial communications were privileged. *Id.* at 396-97. The result was that production of a document may be privileged even when its contents are not. *Id.* at 395-96. The Court also noted that the possession of the records by the subpoenaed person would be so "temporary and insignificant" that the primary possessor would be able to assert his own fifth amendment privilege through a doctrine of constructive possession. *Id.* at 398; *see In re* Grand Jury Proceedings (Manges), 745 F.2d 1250, 1252 (9th Cir. 1984)(constructive possession of records by employee was so insignificant as to leave essentially unaltered incriminating testimonial effects that act of production would put upon employer).

[59] *Fisher*, 425 U.S. at 410. The *Fisher* Court reasoned that the production of documents might constitute testimony when the producer authenticated existence of the documents and acknowledged his control over them. *Id.* However, the Court quickly noted that the testimonial character of these admissions varied with the facts and circumstances of each case. *Id.*; *see In re* Grand Jury Matter (Brown), 768 F.2d 525, 531 n.5 (3d Cir. 1985)(en banc)(Becker, J., concurring)(production constituted nonverbal assertive act which was nonhearsay under FED. R. EVID. 801); Haywood v. United States, 268 F. 795, 802 (7th Cir.) (witness's production of documents was her voucher of their genuineness), *cert. denied*, 256 U.S. 698 (1920). *See generally* Mansfield, *The Albertson Case: Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 SUP. CT. REV. 103, 125-37 (act of production may have testimonial value).

[60] *Fisher*, 425 U.S. at 408. The Court noted that it was not illegal to seek accounting help or for the accountant to prepare work papers and deliver them to the taxpayer. *Id.* at 412. Thus, neither the existence of the papers nor their possession by the taxpayer posed a realistic threat of incrimination. *Id.* Furthermore, the Court asserted that since the taxpayer would not be competent to authenticate the accountant's work papers, and the documents could not be used in evidence without authenticating testimony, there was no "substantial threat" of self-incrimination in the taxpayer expressing his belief, through production, that the papers were those described in the subpoena. *Id.* at 413. Other Courts have formulated various tests to discern when the evidence might be incriminating. *See, e.g.*, United States v. Apfelbaum, 445 U.S. 115, 128 (1980)(citing Marchetti v. United States, 390 U.S. 39, 53 (1968) for proposition that threat of incrimination must be "substantial and real" and not merely "trifling or imaginary"); Hoffman v. United States, 341 U.S. 479, 486-87 (1951) (incriminating if answer "might be dangerous because injurious disclosure could result"). *See generally* Note, *supra* note 17, at 364-72 (in-depth discussion of *Fisher's* criteria of compulsion, testimonial communication, and incrimination); O'Brien, *The Fifth Amendment: Fox Hunters, Old Women, Hermits, and the Burger Court*, 54 NOTRE DAME L. REV. 26, 55-61 (1978)(focus should be on act of production and correlating testimonial communication).

[61] *Fisher*, 425 U.S. at 410. The *Fisher* Court noted that the "implied admissions"

unanswered the question of whether the fifth amendment privilege would shield a taxpayer from producing his own tax records which were in his possession.[62]

The Supreme Court did address this issue in *United States v. Doe*.[63] In *Doe*, a sole proprietor was issued a subpoena seeking production of business records in connection with an investigation into the awarding of county and municipal contracts.[64] The Court, following the analysis developed in *Fisher*, held that the contents of the subpoenaed documents were not privileged because they were made voluntarily.[65] However, the *Doe* Court held that the act of producing the documents would violate the fifth amendment privilege of the sole proprietor.[66] The Court reasoned that the act of producing the records would in-

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test could not be used by custodians of corporate, union, or partnership books or those of a bankrupt business which had been ordered to respond to a subpoena for the business's books even though doing so involved a representation that the documents produced were those demanded by the subpoena. *Id.* at 413; *see* United States v. Shlom, 420 F.2d 263, 265-66 (2d Cir. 1969)(sole owners of corporations have consistently been compelled to submit corporate documents, even though they were incriminating themselves by implied admission in doing so), *cert. denied*, 397 U.S. 1074 (1970); *cf.* George Campbell Painting Corp. v. Reid, 392 U.S. 286, 288-89 (1968) (director/ president/ shareholder in closely held, family-owned corporation could not avail himself of privilege against self-incrimination). *But see In re* Two Grand Jury Subpoena Duces Tecum, 769 F.2d 52, 57 (2d Cir. 1985)(there may be some limited circumstances where corporate custodian may invoke fifth amendment privilege); *In re* Grand Jury 83-8 (MIA) Subpoena Duces Tecum, 611 F. Supp. 16, 24 (S.D. Fla. 1985)(Court must carefully consider fifth amendment implications even with respect to custodians of documents).

[62] *Fisher*, 425 U.S. at 414. The *Fisher* Court did not address whether the privilege protected tax records prepared by an individual taxpayer which were in the possession of the taxpayer when they were subpoenaed. *Id*; *see* Trujillo, *Are a Taxpayer's Private Papers Protected From an IRS Summons under the Fifth Amendment?* 59 Temp. L.Q. 467, 486 & n.137 (1986)(question of individual preparing own tax records having to submit them to subpoena left open for subsequent Supreme Court decisions).

[63] 465 U.S. 605 (1984).

[64] *Id.* at 606-07. The Court noted that the case only concerned business documents and records not required by law to be kept or disclosed to a public agency, even though the five subpoenas had requested some documents required by law. *Id.* at 607 n.3.

[65] *Id.* at 610-11. The Court stated that where the "preparation of business records was voluntary, no compulsion was present." *Id.* (quoting *Fisher*, 425 U.S. at 409); *see In re* Grand Jury Proceedings United States, 626 F.2d 1051, 1055 (1st Cir. 1980)(line of cases culminating in *Fisher* have stripped content of business records of fifth amendment protection; such protection was afforded only to testimonial content of act of turning over records under compulsion).

[66] *Doe*, 465 U.S. at 612-14. The *Doe* Court relied on the findings of the district court that the act of producing the documents would involve testimonial self-incrimination. *Id.* at 613. The Court stated that they would not disturb findings of fact in which two courts below had concurred unless the record did not clearly support the findings. *Id.* at 614.

volve testimonial self-incrimination because enforcement of the subpoena would compel the sole proprietor to admit the existence, possession and authenticity of the documents.[67] The Court did note, however, that the documents could be compelled if the respondent was given a statutory grant of use immunity.[68] The *Doe* Court did not consider whether the fifth amendment provided protection for the contents of private papers of any kind.[69] However, the Court did establish that the act-of-production rationale had no effect on the artificial entity rule.[70] Despite the Court's finding in *Doe*, lower courts have been inconsistent in their efforts to accommodate the artificial entity exception to the act-of-production analysis.[71]

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[67] *Id.*

[68] *Id.* at 614-15. The immunity statutes, 18 U.S.C. §§ 6002-6003 (1982) provide that the prosecuting United States Attorney may request an order requiring an individual to give testimony or provide information if he refuses to do so based on his fifth amendment right against self-incrimination. The attorney may request such an order when he believes that the information or testimony is necessary to the public interest. *Id.* Section 6002 provides that when such an order has been issued, the individual must give the required testimony, and that any information so provided may not be used against the individual in any criminal case, except in a prosecution for perjury. 18 U.S.C. § 6002 (1982). The Supreme Court first approved the concept of statutes authorizing immunity in Counselman v. Hitchcock, 142 U.S. 547, 586 (1892), and approved statutory "use immunity" in Kastigar v. United States, 406 U.S. 441, 462 (1972). *See generally* C. WHITEBREAD, CRIMINAL PROCEDURE § 14.04, at 261-63 (1984)(discussing history of immunity and its effect on fifth amendment privilege).

[69] *Doe*, 465 U.S. at 619. Justice Marshall did not view *Doe* as having considered whether the fifth amendment provided protection for the contents of private papers of any kind. *Id.* at 619. (Marshall, J., concurring in part and dissenting in part).

[70] *Id.* at 608. The *Doe* Court cited *Bellis* and its predecessors for the proposition that the custodian of organizational papers could not claim his privilege to refuse production under a subpoena. *Id.* at 608 n.4; *see also* Fisher v. United States, 425 U.S. 391, 413 n.14 (1976)(despite any incrimination implicit in his act of production, agent of collective entity must produce records of entity on demand).

[71] *See In re* Grand Jury Subpoena (85-W-71-5), 784 F.2d 857, 861 (8th Cir. 1986)(denying act-of-production privilege to attorney who held records of defunct corporation), *cert. dismissed*, 479 U.S. 1048 (1987); *In re* Grand Jury Proceedings (Morganstern), 771 F.2d 143, 148 (6th Cir. 1985)(en banc)(denying use of privilege to custodian of partnership and corporate documents), *cert. denied*, 473 U.S. 1033 (1986); *In re* Grand Jury Proceedings (Lincoln), 767 F.2d 1130, 1131 (5th Cir. 1985)(refusing to allow custodian of records of eight corporations to use privilege because he held records in representative capacity); United States v. Malis, 737 F.2d 1511, 1512 (9th Cir. 1984)(refusing to allow custodian of partnership records to use fifth amendment privilege to avoid compliance with Internal Revenue Service summons); *In re* Grand Jury Proceedings (Vargas), 727 F.2d 941, 945 (10th Cir.)(denying production privilege to attorney who held corporate documents for client), *cert. denied*, 469 U.S. 819 (1984); *see also In re* Grand Jury Proceedings United States, 626 F.2d 1051, 1054 (1st Cir. 1980)(denying production privilege to independent professional practitioner). *See generally* Comment, *United States v.*

In the instant case, the United States Court of Appeals for the Fifth Circuit held that a corporation, regardless of its size, was an artificial entity,[72] and that therefore no fifth amendment privilege would be extended to the custodian of corporate documents which were subject to the visitatorial powers of the state.[73] In accordance with that determination, the court stated that by voluntarily accepting or pursuing a corporate position, the custodian was deemed to have waived his fifth amendment privilege with respect to any testimonial incrimination inherent in the production of subpoenaed corporate records.[74] In addition, the court held that since a corporation was a creature of law with a distinctly separate identity from its owners,[75] then even "one-man" corporations must be considered artificial entities.[76] The court concluded that since it was bound to act in accordance with its prior

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Doe and its Progeny: A Reevaluation of the Fifth Amendment's Application to Custodians of Corporate Records, 40 U. Miami L. Rev. 793, 807-14 (1985)(comprehensive compilation of lower court analysis of *Doe* decision). *But see* United States v. Antonio Sancetta, M.D., P.C., 788 F.2d 67, 74 (2d Cir. 1986)(allowing sole stockholder of corporation to assert privilege while asserting that records could be produced by other agent); United States v. Lang, 792 F.2d 1235, 1240-41 (4th Cir. 1986)(allowing privilege to president of small, closely-held corporation, but corporation must comply with summons through some other person), *cert. denied*, 479 U.S. 985 (1987); *In re* Grand Jury Matter (Brown), 768 F.2d 525, 529 (3d Cir. 1985)(en banc)(reversing contempt citation of holder of corporate documents because production would have incriminated him personally). *See generally* Mosteller, *supra* note 29, at 74-86 (exhaustive citation of cases dealing with lower court's act-of-production analysis).

[72] *In re Grand Jury Proceedings (Doe)*, 814 F.2d at 192. The court rejected appellant's contention that his "one-man" corporations were not collective entities. *Id.* The court justified its ruling on the principles established in *Bellis* and concluded that corporations, no matter how small, were to be considered collective entities. *Id.*

[73] *Id.* The court reasoned that organizational records were subject to review by the organization's members and the visitatorial powers of the state in which the corporation received its charter of incorporation. *Id.* Thus, the fifth amendment privilege was not applicable to the custodian of corporate records. *Id.* at 192-93.

[74] *Id.* at 193. The court relied on United States v. White, 322 U.S. 694, 700 (1944) and concluded that when an individual acted as a representative of a collective group, he enjoyed the rights and privileges of the entity. *In re Grand Jury Proceedings (Doe)*, 814 F.2d at 193. Therefore, the individual was also bound by the duties and obligations of the entity, including production of the corporate documents upon demand by a governmental agency. *Id.*

[75] *In re* Grand Jury Proceedings (Doe), 814 F.2d at 192. The court's underlying rationale was that a corporation, when chartered, was cloaked with a legal personality, separate and apart from that of its owners. *Id.*

[76] *Id.* The court observed that the fact that a corporation had a sole shareholder was not determinative of whether or not the organization was an artificial entity. *Id.* Rather, the controlling factor was that the individual was doing business through the corporate name. *Id.*

decisions,[77] then the assertion of an act-of-production privilege by a sole shareholder of a corporation must be denied.[78]

In *In re Grand Jury Proceedings (Doe)*,[79] the United States Court of Appeals for the Fifth Circuit demonstrated its unwillingness to displace the traditional fifth amendment doctrine that precluded self-incrimination claims for individuals required to produce corporate records.[80] With its decision, the Fifth Circuit joined the majority of courts in holding that the *Bellis* rule was controlling in cases involving the denial of an act-of-production privilege to a custodian of corporate documents.[81] Even if *Bellis* was narrowly read,[82] artificial and collective entity documents would still be available by using alternative means of production and authentication or limited grants of immunity.[83] Despite the weight of authority, however, some courts have interpreted *Doe*[84] too broadly with respect to collective entity documents.[85] It is well established that the fifth amendment was initially designed to protect natural individuals from oppressive governmental activity.[86] However, the fifth amendment was not intended to act as a shield for the protection of artificial entities.[87] With the growing need to combat rising corporate criminal activity,[88] it is apparent that the regulatory purpose of investigating corporate crimes would become thwarted and futile if access to corporate documents were denied.[89] Because crimes and activities of corporate entities are economic in nature, conventional evidentiary sources are unavailable and must be discarded in favor of the only permanent records of the activities in question, the corporate documents.[90] Requiring all corporations to obey court orders for production of documents would prevent corporate agents from concealing the contents of corporate documents and reduce the possibility of criminal activity.[91] Individuals who enjoy the benefits of doing business through a corporation must also be bound by the obligations of the entity.[92] Thus, as the Fifth Circuit in *In re Grand Jury Proceeding (Doe)* correctly held, the one-man corporation must also produce its records upon demand by a governmental agency.

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[77] *Id.* at 193. The court had previously held in *In re* Grand Jury Proceedings (Lincoln), 767 F.2d 1130, 1131 (5th Cir. 1985) that an assertion of an act of production privilege by a corporate custodian was foreclosed by *Bellis*, and that opinion was binding on the instant case by stare decisis. *In re Grand Jury Proceedings (Doe)*, 814 F.2d at 193.

[78] *In Re Grand Jury Proceedings (Doe)*, 814 F.2d at 193. The court noted that other circuits have been split over the issue of allowing custodians of collective entity records a fifth amendment privilege against production and possible self-incrimination. *Id.*; *see supra* note 71 and accompanying text. However, the Fifth Circuit followed the majority view and refused the privilege. *In re Grand Jury Proceedings (Doe)*, 814 F.2d at 193.

[79] *Id.*

[80] *Id.* at 192.

[81] *See supra* note 71 and accompanying text.

[82] *See supra* note 71 and accompanying text.

[83] *Id.*

[84] United States v. Doe, 465 U.S. 605 (1984).

[85] *See supra* note 70 and accompanying text.

[86] *See* Gerstein, *supra* note 16, at 345.

[87] *See supra* note 20 and accompanying text.

[88] *See* Comment, *supra* note 21 at 1229-32.

[89] *Id.*

William R. Striebeck

AUTHOR'S NOTE: Since this casenote was written, and during the process of its publication, oral arguments on the case were presented before the United States Supreme Court. The Supreme Court rendered its opinion on June 22, 1988.[93] In a 5-4 decision, Chief Justice Rehnquist, writing for the majority of the Court, affirmed the decision reached by the United States Court of Appeals for the Fifth Circuit in *In re Grand Jury Proceedings (Doe)*. The law, as it stands, will continue to deny a fifth amendment privilege to custodians of corporate documents. Very prevalent in the Supreme Court's decision was the view that the Government's efforts to prosecute white-collar crime would be stymied if corporate custodians could assert the privilege.

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[90] *See* Note, *supra* note 31 at 949-51.

[91] *See supra* note 21 and accompanying text.

[92] *See supra* note 31 and accompanying text.

[93] *In re* Grand Jury Proceedings (Doe), 814 F.2d 190 (5th Cir. 1987), *aff'd sub nom.* Braswell v. United States, 108 S. Ct. 2284 (1988).

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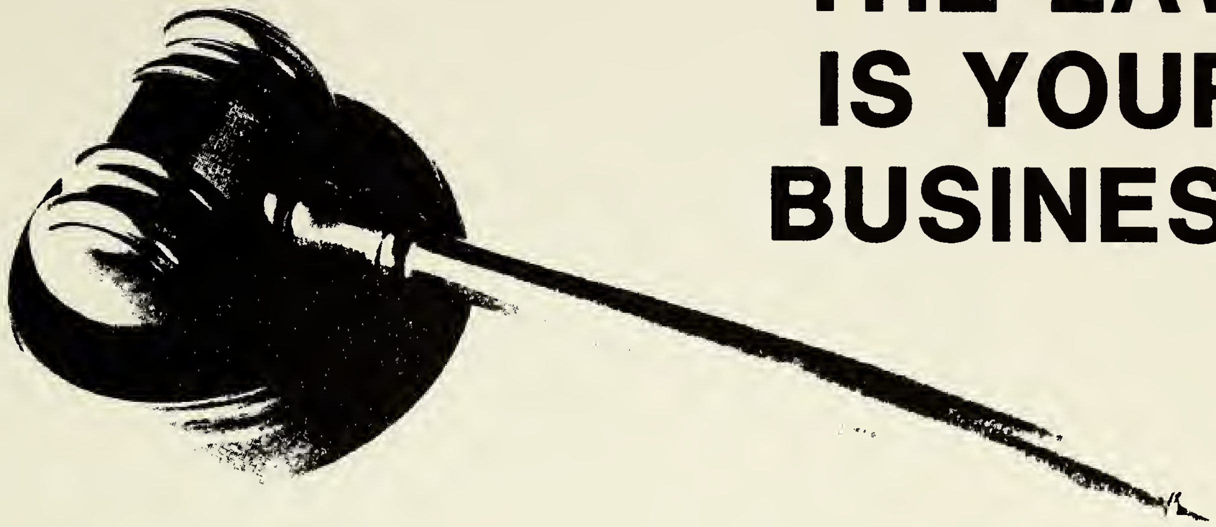

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